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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1382

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-3a) is reported at 544 F.2d 903. The oral opinion of the district court (App. D, *infra*, pp. 6a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 4a) was entered on November 23, 1976.

A timely petition for rehearing was denied on February 8, 1977 (App. C, *infra*, p. 5a). On March 2, 1977, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including April 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a second trial of a defendant after the court, at the defendant's request, dismissed the indictment during trial on the ground that pre-accusation delay violated the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 12 provides in relevant part:

> (b) Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. * * * The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; * * *
>
> * * * * *
>
> (e) A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. * * *

STATEMENT

Respondent, a member of the Muskegon, Michigan, police force, was arrested on January 22, 1975, on a complaint charging him with two drug offenses. The complaint alleged that on September 24, 1974, respondent had sold codeine and that on January 22, 1975, he had sold heroin. He was indicted on these charges on March 5, 1975, and the indictment also charged respondent with distributing cocaine on September 20, 1974. The September 20 transaction formed the basis of Count I, the September 24 transaction the basis of Count II, and the January 22 transaction the basis of Count III. All of the trans-

actions were alleged to violate 21 U.S.C. 841(a)(1).

Respondent moved before trial to dismiss Counts I and II on the ground that the pre-accusation delay violated the Due Process Clause of the Fifth Amendment. The district court held a hearing on this motion and denied it, but without prejudice to renewal at a later time.

Respondent's trial began on December 1, 1975. The evidence presented by the prosecution tended to show that respondent, a member of the narcotics unit of the Muskegon police force, had gone into business for himself and was selling drugs to Robert Jordan, an informant for the Drug Enforcement Administration (Tr. 11-32).

At the close of the prosecution's case, respondent renewed his motion to dismiss Counts I and II because of pre-accusation delay. The court again denied this motion, and respondent presented his defense. Respondent presented evidence tending to show that he dealt with Jordan only in the line of official duties. The theory of the defense was that Jordan had "set up" respondent so that Jordan would be able to traffic in drugs with less risk to himself. Respondent took the stand and testified about the transactions of September 24 and January 22; respondent contended, however, that he could not remember the events of September 20 (Tr. 313-317, 323-324, 338-339, 353, 400-404, 515-519, 536).

After all of the evidence had been received, petitioner again moved to dismiss Counts I and II because of pre-accusation delay. This time the district court granted the motion. The district court

stated that Count I should be dismissed because intentional delay had prejudiced respondent. The prejudice, the court concluded, lay in respondent's inability to recall the events of September 20 (see App. D, *infra*, pp. 6a-7a). The delay was impermissible, the court explained, because it was for the purpose of gaining a tactical advantage over respondent—the delay was intended to allow respondent to commit additional crimes and thus to increase the probability that he would be convicted (*id.* at 8a).[1]

The district court submitted Count III to the jury. The jury returned a verdict of not guilty (App. A, *infra*, p. 2a).

The United States appealed, seeking reversal of the dismissals of Counts I and II. The court of appeals dismissed the appeal for want of jurisdiction (App. A, *infra*, pp. 1a-3a). The court concluded that the Double Jeopardy Clause bars an appeal by the United States from an order entered during a trial dismissing an indictment.

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[1] The district court's reasons for dismissing Count II are not clear. The court stated (App. D, *infra*, pp. 8a-10a) that respondent should have been offered additional assistance in carrying out his police tasks, that the jury would be entitled to agree with respondent's version of events, that respondent might have forgotten important evidence, and that "a compromise verdict • • • may result if [respondent] were to be—had to stand trial all the way on the three counts." Because the reasons for the district court's dismissal of Count II are not clear (the concern about prejudicial joinder would have supported an order granting a mistrial but not an order dismissing the indictment), we do not present in this petition any question concerning Count II of the indictment.

REASONS FOR GRANTING THE PETITION

This case is similar to *United States* v. *Wilson*, 420 U.S. 332, because the district court has dismissed an indictment on the ground of pre-accusation delay and the court of appeals has held that an appeal by the United States is barred by the Double Jeopardy Clause. It is different from *Wilson* in that here the district court, at respondent's insistence, dismissed the indictment before sending the case to the jury. This case therefore presents the important question, not reached in *Wilson*, whether an order dismissing an indictment during trial, for reasons that do not go to the general issue of guilt or innocence, bars a second trial.[*] Cf. *Serfass* v. *United States*, 420 U.S. 377, 394, which reserves the question presented by this case.

The present case presents one facet of a problem that has vexed the courts of appeals and deserves resolution by this Court: When, if at all, may a defendant be prosecuted a second time after the first trial has ended, prior to a verdict by the factfinder, in an order dismissing the indictment? One aspect of this question is before the Court in *Lee* v. *United States*, No. 76-5187, certiorari granted, January 10, 1977, which involves an order entered near the close of trial, at the request of the accused, dismissing the information because of a defect in its drafting.

[*] Since this case does not involve an acquittal, its proper disposition is unaffected by this Court's recent decision in *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977.

A related question is presented in *United States* v. *Sanabria*, 548 F.2d 1 (C.A. 1), petition for a writ of certiorari pending, No. 76-1040, in which the court of appeals held that a second trial always is permitted after a court erroneously dismisses an indictment in mid-trial at the request of the accused.

Many federal courts have considered related problems and come to widely divergent conclusions. *United States* v. *DiSilvio*, 520 F.2d 247 (C.A. 3), certiorari denied, 423 U.S. 1015, like *Sanabria*, holds that a defendant always may be retried after an indictment has been dismissed in mid-trial at his request, and the defect can be cured. *United States* v. *Kehoe*, 516 F.2d 78 (C.A. 5), certiorari denied, 424 U.S. 909, holds that a defendant who intentionally delays until jeopardy has attached making an argument that he has been prosecuted under the wrong statute may not object on double jeopardy grounds to a second trial.

Other cases, however, hold that the Double Jeopardy Clause bars a second trial after any mid-trial order (other than a declaration of a mistrial) that terminates an ongoing trial, despite the fact that the defendant has requested the termination. See *United States* v. *Lucido*, 517 F.2d 1 (C.A. 6) (order terminating a prosecution because of belated suppression of evidence); *United States* v. *Means*, 513 F.2d 1329 (C.A. 8) (order terminating the prosecution because of alleged prosecutorial misconduct and unwillingness to consent to an 11-member jury); *United States* v. *Robbins*, 510 F.2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048 (order dismiss-

ing an indictment because the statute is unconstitutional as applied).

These cases consider the effect on reprosecution of a large number of factors: whether the motion to dismiss the indictment should have been made before trial, whether the district court's decision was based upon evidence heard at trial, whether the decision to terminate the trial involved the general issue of guilt or innocence, and so on. We have argued in *Lee*, however, that a single factor ordinarily should be dispositive: whether the accused has requested or agreed to the termination of the trial, thus abandoning his valued right to receive the verdict of the fact-finder then empaneled.[3]

Our argument in *Lee*, if accepted, would govern this case; respondent twice asked during trial to dismiss Counts I and II of the indictment, and he thus plainly abandoned his right to receive the verdict of the jury on those counts. See *United States* v. *Dinitz*, 424 U.S. 600. If respondent had desired to receive the verdict of the jury on Count I, he could have asked the district court to withhold decision on his motion until after verdict. This would have preserved his chance to be acquitted on the facts, and it would have averted any necessity to hold a second trial on account of the issue of pre-indictment delay. Deferral is the better course (see

[3] See pages 14-27 of our brief in *Lee*, which we have furnished to counsel for respondent.

Fed. R. Crim. P. 12(e));[4] that course was followed in *Wilson* and should have been followed here as well.

If the Court accepts our major argument in *Lee*, then it should grant the petition in the instant case and remand for consideration of the merits of the appeal.[5] If the Court should decide *Lee* on a ground

[4] See pages 40-48 of our brief in *United States* v. *Lovasco*, No. 75-1844, argued March 21 and 22, 1977. (We have furnished to counsel for respondent a copy of that brief.) Rule 12(e) provides that pretrial motions shall not be decided during trial if that decision would adversely affect any party's right to appeal. *Wilson* held that if a court reserves decision until after verdict on a claim of pre-accusation delay, and then sets aside a verdict of conviction, the prosecution may appeal that adverse decision. See also *United States* v. *Morrison*, No. 75-1534, decided October 12, 1976 (prosecution may appeal post-verdict grant of suppression motion). As a comparison of *Wilson* with the decision of the court of appeals in the instant case vividly illustrates, failure once trial has commenced to defer until after verdict a ruling on a motion to dismiss for pre-accusation delay, in the view of at least some courts, eliminates the prosecution's right to appeal.

[5] On the merits, the district court is patently incorrect. A delay of five months between the commission of the crime and the date of the indictment is not inordinately long; respondent's claim of prejudice—simple forgetfulness—has not been accepted as adequate by any court of appeals when the delay is so short; and the district court's finding that the prosecution delayed instituting the prosecution with the intent to gain a tactical advantage over respondent is clearly erroneous. See generally pages 13-40 of our brief in *United States* v. *Lovasco*, *supra*. The district court acknowledged (App. D, *infra*, p. 8a) that the delay in arresting respondent was caused by the continuing nature of the criminal investigation. The court concluded that it was improper to allow respondent to

other than the one we have discussed above, however, then its decision might well leave unanswered one or more of the important double jeopardy issues that have caused such confusion in the lower federal courts. In that event, we believe that it would be appropriate for the Court to grant review here or in another case to resolve these important issues.

We have not opposed the petition for a writ of certiorari in *United States* v. *Sanabria*, *supra*, which involves an erroneous mid-trial order terminating a prosecution because of a supposed deficiency apparent on the face of the indictment. The present case, unlike *Sanabria*, involves a dismissal based on evidence heard at trial; moreover, unlike *Sanabria*, the district court here did not purport to "acquit" the defendant or resolve in his favor any substantive issues of criminal responsibility. The Court there-

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commit additional crimes, and that allowing him to do so was an intentional acquisition of a tactical advantage. But a suspect has no constitutional right to immediate arrest before he can commit additional crimes or provide additional evidence. *Hoffa* v. *United States*, 385 U.S. 293, 309-310. If a trial on multiple crimes would seriously prejudice a defendant, the remedy is a severance under Fed. R. Crim. P. 14, not an order dismissing the indictment. Respondent, however, did not seek a severance. Even if allowing a suspect to commit additional crimes could be thought to entail acquisition of a tactical advantage justifying the dismissal of an indictment, the court should dismiss only the counts of the indictment charging the defendant with the crimes during the period of delay. In the present case, for example, even on the district court's theory, respondent should have been entitled to the dismissal only of Count III, while Count I should have been submitted to the jury.

fore may wish to consider granting review in the present case, in *Sanabria*, or in both, depending upon its disposition of *Lee*.

CONCLUSION

Consideration of this petition should be deferred pending this Court's decision in *Lee*.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys.

APRIL 1977.

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* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Michigan, Southern Division

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Decided and Filed November 23, 1976

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

PER CURIAM. Defendant-appellee was charged in a three count indictment with the distribution of cocaine, codeine and heroin. The counts related to separate occurrences, and because a substantial period had elapsed between the commission of the offenses charged in counts 1 and 2 a motion for their dismissal on the ground of preindictment delay was

filed prior to trial, which was denied without prejudice. At the jury trial the motion was renewed at the conclusion of the government's case, and it was again denied without prejudice. Subsequently, after the defense had presented its case and had rested, the motion to dismiss was renewed and it was then granted by the district court on the basis of preindictment delay and the prejudice the district judge found that it caused to defendant's case. The jury thereafter returned a verdict of not guilty as to count 3, and the present appeal is purported to have been perfected by the government from the order dismissing counts 1 and 2 of the indictment.

18 U.S.C. § 3731 permits an appeal by the United States in a criminal case to a court of appeals from an order of a district court dismissing an indictment as to any one or more counts, but provides "that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." We conclude that this case falls squarely within that exception.

This court has held that appellate review is barred, where as here, a mid-trial ruling by the district judge was based upon facts established by evidence received at trial, *United States* v. *Robbins*, 510 F.2d 301 (6th Cir. 1975), and where a mid-trial decision acquitted the defendant after the court had granted a defense motion to suppress evidence. *United States* v. *Lucido*, 517 F.2d 1 (6th Cir. 1975). See also what has been referred to as the *Wilson-Jenkins-Serfass*

trilogy. (*United States* v. *Wilson*, 420 U.S. 332 (1975); *United States* v. *Jenkins*, 420 U.S. 358 (1975) and *Serfass* v. *United States*, 420 U.S. 377 (1975)).

It is concluded that this Court is without jurisdiction in the premises.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Nov. 23, 1976, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that it is without jurisdiction in the premises.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

Issued as Mandate: March 3, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-1533

[Filed Feb. 8, 1977, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN ARTHUR SCOTT, DEFENDANT-APPELLEE

ORDER

Before: PHILLIPS, Chief Judge, and WEICK and PECK, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by plaintiff-appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk of Court

APPENDIX D

OPINION FROM THE BENCH

THE COURT: The Defendant has renewed his motion to dismiss Counts I and II based on the delay between the date the offenses are alleged to have occurred and the time he was charged.

I hereby grant the motion to dismiss with respect to Count I.

The Defendant testified with a good deal of specificity as to the occurrence on September 24, 1974, that is, the alleged offense in Count II.

In the Count with respect to Count I involving an alleged offense of September 20, 1974, the Defendant was able to give only a general denial. He could not recall the specifics of what happened on that date. I find the prejudice shown with respect to Count I caused by the preindictment delay was sufficient to result in the dismissal of that Count.

I note that the Defendant's testimony was given before the jury considering his guilt or innocence and not simply presented in separate hearing before me.

In addition, it is not insignificant that Bobby Jordan also had some difficulty remembering the details of the September events, even though he had the benefit of written statements.

Furthermore, the difference in the Defendant's ability to recall events of September 20th and events of September 24th is not without reason. When the Defendant was arrested on January 22, 1975, a Com-

plaint charged him with the offense alleged that occurred—alleged to have occurred on January 22, 1975 and September 24, 1974. The indictment returned by the Grand Jury on the 5th of March, 1975, added the September 20th offense. This additional delay can explain the differences in the Defendant's ability to recall.

The Government is correct in stating that the issue of preindictment delay is one of balancing of interests. However, as stated above, in this case a balance of those interests results in the dismissal of Count I.

The problem is to determine how much, if any, prejudice need be shown, based on the Government's reason for the delay. The quantum of prejudice which need be shown will vary with the circumstances. U.S. versus Marion, cited in 404 U.S. Supreme Court 307, 1971. For delay which is completely unintentional a defendant will have to show at least substantial actual prejudice.

On the other hand, if the delay is caused by the Government, intending to prejudice the Defendant's opportunity to present a defense, only a minimal amount of prejudice, if any, may be required. In between these two extremes will be a variety of instances of intentional but legitimate delay. See, for example, United States versus King, 521 Fed. 2d 356, 6th Circuit case. Each case must be considered on the basis of the totality of the circumstances peculiar to it. U.S. versus Marion, supra.

Here the reason for the delay was principally to gain tactical advantage over this Defendant—to gather more evidence of alleged offenses by him. Obviously the more charges which can be brought against one defendant in one proceeding the more likely the jury will not believe an innocent explanation of a single count or a single charge. Prejudice to the Defendant's ability to present his defense was not intended, but such was the result of Count I.

I want to repeat and emphasize the delay here was the result of the Government's intentional choice, with the principal motive being to gather evidence of further crimes, further alleged crimes by the Defendant in order to gain a tactical advantage at the trial. In such a situation the Defendant may show a lesser degree of prejudice to justify dismissal than where the reason for delay is neutral as respects the particular defendant charged.

I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.

However, evidence of the charge involved in Count I is admissible to the same extent as evidence of any other alleged criminal action by the Defendant. See U.S. versus Jones, the Federal Rules of Evidence for the United States in the United States Courts 405.

The Defendant's denial of ever having distributed narcotics tempers the delay-induced prejudice sufficiently to allow evidence to be received as relevant to the other charges.

I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.

There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.

One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to carry when he was in that jungle. And what—here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all of the things he had to try to remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.

I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may

result if he were to be—had to stand trial all the way on the three counts.

And it is so ordered.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum discusses three cases decided by this Court after our petition was filed.

1. *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, establishes beyond serious dispute that the district court erred in dismissing Count I of the indictment in this case. The district court concluded that the government made an "intentional choice" to delay seeking an indictment, "with the principal motive being to gather evidence of further crimes" by respondent (Pet. App. 8a).[1]

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[1]Agent Stephen Young testified that the investigation of respondent had been continued to determine whether other police officers were involved in drug transactions, to ascertain the source of respondent's drugs, and to allow the purchase of drugs from respondent by a federal agent rather than by an informant (Tr. 292-294).

Lovasco makes it clear that delay for the purpose of pursuing a criminal investigation does not offend the Due Process Clause of the Fifth Amendment, even if a potential defendant is prejudiced by the delay.

2. *Lee* v. *United States*, No. 76-5187, decided June 13, 1977, and *Finch* v. *United States*, No. 76-1206, decided June 29, 1977, establish benchmarks against which the double jeopardy issue of this case may be measured. *Finch* held that if charges are dismissed on their merits by the district court after jeopardy has attached, no further proceedings may be held unless the district court or the jury also rendered a finding or verdict of guilt that may be reinstated. *Lee* held that when an indictment or information is dismissed in mid-trial on the defendant's motion for a reason not inconsistent with reprosecution, a second trial on a proper charge does not violate the Double Jeopardy Clause.

This case presents a question that neither *Lee* nor *Finch* addressed: May there be a second trial when an indictment is dismissed with prejudice in mid-trial, on the defendant's motion, for a reason that is unrelated to guilt or innocence? Although the Court explained in *Lee* (slip op. 7) that a second trial is barred when dismissal "is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged," we submit that the scope of this principle needs clarification, and that it properly should be applied only to dismissals based upon some determinations of the guilt or innocence of the defendant, the aspect on which we believe the Court was focusing in this discussion.

A defendant who obtains a ruling in his favor by the district court constituting "a legal determination on the basis of facts adduced at trial relating to the general issue

of the case"[2] has a recognized interest in preserving the district court's ruling. Whatever the label, a true acquittal during trial has been accorded by the Double Jeopardy Clause a very special sort of finality.[3] Once a defendant has been acquitted at trial, the Double Jeopardy Clause interdicts further attempts to convict him. *Green* v. *United States*, 355 U.S. 184, 187-188.

In contrast to *Lee*, *Finch* involved a finding by the district court absolving the defendant of criminal responsibility; the district court concluded that the defendant had not committed any crime. There was no such ruling by the district court here. A district court's ruling is an acquittal "only if it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.'" *Lee* v. *United States*, *supra*, slip op. 6 n. 8, quoting from *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 7. The district court in the present case denied respondent's motion for an acquittal based on the sufficiency of the evidence (Tr. 300-302) and decided, instead, that respondent should be released whether or not he was guilty of the crime charged by Count I. Whatever significance that action might have, it was not a resolution of the general issue of guilt or innocence.

Although the district court did not contemplate that respondent could be reprosecuted after the dismissal for preaccusation delay, we believe that the trial judge's subjective assessment of the effect of his action should

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[2] *Serfass* v. *United States*, 420 U.S. 377, 393, quoting from *United States* v. *Sisson*, 399 U.S. 267, 290 n. 19.

[3] *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 6-7, 11; *Lee* v. *United States*, *supra*, slip op. 6-7 n. 8.

not control its double jeopardy consequences. Respondent would be exposed, at a second trial, to no greater expense or anxiety than Lee was, yet this Court concluded that Lee's second trial was proper. The second trial is necessary—here, as in *Lee*—in order to subject respondent to his *first* decision on guilt or innocence.

The first trial of respondent did not end because of prosecutorial or judicial overreaching; it ended, as in *Lee*, by a favorable judicial response to a motion the defendant himself had made. As in *Lee*, the defendant could have avoided the mid-trial termination, and obtained the verdict of the jury, by the simple expedient of asking the court to allow the case to proceed to verdict before ruling on the claim of impermissible pre-indictment delay. Here, as in *Lee* and *United States* v. *Dinitz*, 424 U.S. 600, the defendant "exercised his choice in favor of terminating the trial" before verdict; the proceedings "were terminated at the defendant's request and with his consent" (*Lee* v. *United States*, *supra*, slip op. 9, 10). "[C]ounsel offered no objection when the court * * * decided to terminate the proceedings without having entered any formal finding on the general issue" (*id.* at 10).

In *Lee* the first trial was terminated because of the prosecutor's error in drafting the information; here the only error was that committed by the district court in dismissing the indictment at respondent's request. Respondent had it within his exclusive power to obtain a definitive resolution of his guilt or innocence in a single trial. He could have postponed his motion or requested the district court to rule upon it after the jury had returned its verdict. If the jury had acquitted him, that would have been the end of the matter, and if it had convicted him, the district court and the court of appeals

could have resolved the question of preaccusation delay without the necessity of a second trial. See *United States* v. *Wilson*, 420 U.S. 332. We have argued elsewhere that a district court always should postpone until after verdict ruling upon a motion to dismiss for preaccusation delay;[4] the district court's error in ruling before verdict was induced by respondent, and it should not stand as a bar to further proceedings if the district court erred on substance as well as on procedure.

We submit, in sum, that when a defendant seeks and obtains a mid-trial dismissal for reasons that do not amount to an "acquittal," he may be tried a second time if he led the district court into error.[5] The defendant's desire to avoid even one ruling on guilt or innocence, and the costs to him of a second trial, must be subordinated to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

3. The Court has granted review in *Sanabria* v. *United States*, No. 76-1040, certiorari granted, June 27, 1977, which is discussed in our petition. *Sanabria*, like *Lee*, involves a termination based upon a perceived defect in the charge, and the central question in *Sanabria* is whether the termination amounted to an "acquittal." The present case involves a termination based on the

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[4]See pages 40-48 of our brief in *United States* v. *Lovasco*, *supra*. The Court did not reach this argument in *Lovasco* (see slip op. 5 n. 7).

[5]For example, it should not have made a difference in *Lee* if the defendant, instead of asking for an ordinary dismissal of the information, had asked for and received a dismissal *with prejudice* because of the drafting error. In either event the defendant's interests in avoiding a second trial would be the same, and a second trial should be permissible because the district court did not resolve the general issue in favor of the defendant.

district court's belief that the defendant (for reasons unrelated to his guilt) could never be successfully prosecuted. The Court's disposition of the "acquittal" problem in *Sanabria* therefore is unlikely to control this case, and it would be advantageous to the lower federal courts for this Court to resolve the status of dismissals that do not go to the general issue of guilt or innocence. It therefore should set the present case for plenary review.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

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*The Solicitor General is disqualified in this case.

DOJ-1977-07

Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 8, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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* The opinion of the court of appeals is reproduced as Appendix A to the petition for a writ of certiorari. The judgment of the court of appeals is reproduced as Appendix B, the order of the court of appeals denying rehearing is reproduced as Appendix C, and the oral opinion of the district court is reproduced as Appendix D to the petition.

RELEVANT DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS
1975	
March 5	Filed Indictment
Apr. 7	Filed Motion To Dismiss Counts I and II Of Indictment
Sept. 25	Hearing on motion to dismiss held before Judge Fox., as to Counts 1 & 2 and (2) for severance of all counts. Taken under advisement.
Nov. 20	Filed Order on Motions to Dismiss Counts I and II, and to sever all counts to be tried. Order s/ Judge Fox; d/11/20/75.
Dec. 1	Jury trial commenced. (1) Jury drawn by Magistrate S. Karr.
Dec. 2	Jury trial continued. (2)
Dec. 3	Jury trial continued. (3) Defendant's motion to dismiss counts 1 & 2—denied. Motion for judgment of acquital by deft—denied.
Dec. 4	Jury trial continued. (4) Defendant renewed his motion to dismiss cts. 1 & 2—taken under advisement.
Dec. 5	Jury trial continued. (5) Defendants motion to dismiss is granted as to count 1 and 2. Defendant's motion for directed acquital is denied
Dec. 5	Jury verdict—not guilty on count 3.
Dec. 10	Filed Jury Verdict.
Dec. 31	Filed Plaintiff's Notice of Appeal from dismissal of 12-5-75 Ct. 2
1976	
Jan. 29	Filed Plaintiff's Notice of Appeal from dismissal of Count 1 of the Indictment on 12-5-75

RELEVANT COURT OF APPEALS DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1976	
Oct. 21	Cause argued by Robert C. Greene for Appellant, by William C. Marietti for Appellee and case submitted to the Court (Before: Phillips, Weick and Peck, JJ.)
Nov. 23	Judgment dismissing appeal for lack of jurisdiction (No Costs)
Nov. 23	Opinion Per Curiam
1977	
Feb. 8	Order denying petition for rehearing (Phillips, Weick and Peck, JJ.)

INDICTMENT

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. G 75-54 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

JOHN ARTHUR SCOTT, DEFENDANT

The Grand Jury charges:

Count 1

That on or about September 20, 1974, in the City of North Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately .117 of a gram of cocaine, a Schedule II narcotic drug controlled substance.

21 U.S.C. § 841 (a) (1)

Count 2

That on or about September 24, 1974, in the City of North Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately 1.0 gram of a white powdered substance

containing codeine, an opium derivative, a Schedule II narcotic drug controlled substance.

21 U.S.C. § 841(a)(1)

Count 3

That on or about January 22, 1975, in the City of Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately 1.8 grams of a light brown powdered substance containing heroin hydrochloride, a Schedule I narcotic drug controlled substance.

21 U.S.C. § 841(a)(1)

A TRUE BILL

_____

Foreman

_____

Frank S. Spies
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

_____

THE UNITED STATES OF AMERICA

—*v*—

JOHN ARTHUR SCOTT

_____

MOTION TO DISMISS COUNTS I AND II
OF INDICTMENT

The Defendant, John Arthur Scott, moves that Counts I and II of the indictment in the above entitled cause be dismissed pursuant to Rule 12 of the Federal Rules of Criminal Procedure on the following grounds:

1. The government unnecessarily and intentionally delayed a period of approximately five and one half months before seeking an indictment on Count I.
2. The government unnecessarily and intentionally delayed a period of approximately four months before filing a complaint and warrant and arresting Defendant for the offense set forth in Count II.
3. The unjustified and unreasonable delay set forth in paragraphs one and two hereof resulted in prejudice of a substantial nature to the Defendant in the preparation of his defense due to the inability of the Defendant to reconstruct accurately and recollect the facts and circumstances surrounding the offenses alleged in Counts I and II.
4. The aforesaid delays prevent Defendant's witnesses from accurately recollecting and reconstructing the events surrounding the offenses alleged in Counts I and II.
5. The intentional delay set forth herein was not justified by any motive of the government to ensure the fair

and efficient execution of law enforcement functions, but rather constituted a form of harassment and was designed to disadvantage the Defendant in the preparation of his defense.

6. The intentional, unnecessary, unreasonable and prejudicial delays set forth herein resulted in a denial of due process guaranteed to the Defendant by the fifth amendment to the Constitution of the United States.

Dated: April 3, 1975

/s/ William C. Marietti
WILLIAM C. MARIETTI
Attorney for Defendant

BOESCHENSTEIN, MARIETTI, MULLALLY & GRIMM
820 Terrace at Clay
Muskegon, Michigan 49440

[2]

Grand Rapids, Michigan
Thursday, September 25, 1975
2:28 P.M.

PROCEEDINGS

THE COURT: You may proceed in this case.

MR. MARIETTI: Your Honor, we have brought a motion, two motions here to be heard by the Court today in this matter, one being a Motion for Dismissal of Counts I and II, and another being a Motion for Severance of the three counts for the purposes of trial.

I would assume that it would be most appropriate to deal with the dismissal motion first.

THE COURT: All right.

MR. MARIETTI: As to that motion, our position is fairly well stated in the brief which was filed with the Motion back in April. There are a few matters that I would like to point out to the Court by way of oral argument at this time that were raised in the brief that was submitted by the United States Attorney on the Motion to Dismiss.

In the United States Attorney's brief, he has cited and furnished a copy to you of United States of America versus Anthony Giacalone, a Sixth [3] Circuit case, which the District Attorney asserts stands for the proposition that it is incumbent upon the defendant in a motion of this nature to establish an intentional governmental delay in the matter.

We submit that is not what the Giacalone case says.

There is a recent case I would like to cite to the Court that I just became aware of that has cited the Giacalone case. The name of the case is Hamilton v. Lumpkin, L-u-m-p-k-i-n, 389 F.Supp. 1069, 1975, Eastern District of Virginia.

THE COURT: What is that?

MR. MARIETTI: Eastern District of Virginia.

THE COURT: The citation?

MR. MARIETTI: 389 F.Supp. 1069.

Now basically what we are talking about in this motion, your Honor, is not the Sixth Amendment Speedy

Trial question. The District Attorney spends most of his brief dealing with cases that dealt with the Sixth Amendment Speedy Trial issue. We are not dealing with that. We are dealing with due process as it is defined in the Fifth Amendment to the Constitution, and that is what the Giacalone case addresses itself to, was the due process question.

[4] Now in this case we are talking about a delay from September 20th of 1974 to sometime in the middle part of March before an Indictment was returned against this defendant on Count I. In the meantime, the Drug Enforcement Administration had proceeded to accumulate further evidence using the same informant against this defendant on September 20th and January 22nd.

Now the question arises in my mind, and I feel it should arise in the Court's mind, is what purpose was served by the delay, what governmental purpose was served by the delay from September 20th to March 20th, roughly March 20th, in bringing this first count? Was it the purpose of concealing the identity of the informant? That was revealed on January 22nd, that was revealed at a preliminary examination subsequent thereto. What was the purpose in that delay, if it wasn't to confuse and confound this defendant in the preparation of his defense? Why we have this delay is the question I am here to ask. I submit there has been a denial of due process, of what has been defined as substantial fair play.

This defendant has extreme difficulty recalling those events. He was an undercover narcotics officer dealing with many cases.

[5] THE COURT: The defendant was an undercover—

MR. MARIETTI: The defendant was an undercover narcotics' officer for the Central Narcotics Bureau, the County of Muskegon, and the prosecution was well aware that this man was dealing with a lot of—a lot of cases in the course of his work, and yet they held off. They held off till March before they did anything about informing this man of any charges against him.

Now why? Why when they had an informant who had already been accused by this defendant—as a matter

of fact, had a case pending for sale of Heroin accused by this defendant, why did they hold off? If they had such a great case back in September, why did they wait? Why are we still waiting now? Are we waiting because now the man has got three more charges against him and they have got another hammer to use on him?

I grant to the Court that we don't have a speedy trial motion here, but this is some information that just came to my attention this last weekend. Now this man is sitting here accused by someone he had accused previously, and he is sitting there accused by a man who has got four charges pending [6] against him. Is that due process, that kind of a delay, to accumulate more hammers, more vices to use on an already obviously scared informant, an informant who has a lot to gain, because the only man standing between him and the prison sentence is this man here; is that due process? Do we have to show, as the Prosecutor sets forth, both an intentional delay on the part of the Government and substantial prejudice?

Well, I submit there has been an intentional delay; there has been an intentional delay because the informant was revealed as early as January. What other reason did they have for delaying these charges until March except to subject this defendant to further confusion and the further possibility and the actuality now of the lapse and dimming of a memory?

Now as far as the actual prejudice goes or the substantial prejudice, the Marion case again, as was recently interpreted by the Hamilton versus Lumpkin case, does not stand for the proposition that it is incumbent upon the defendant to show both the actual prejudice and the intentional governmental delay.

The Court in the Marion case merely said that the Government conceded that if the defendant were able to show both the delay, intentional, and [7] actual prejudice, that there would be grounds for a dismissal. The Court only said the Government conceded that. But as is revealed in the Lumpkin case, it is an either/or proposition. It is an alternative proposition. And I would submit that this is exactly what the Court said in this Sixth

Circuit in United States versus Giacalone on page 6 of the opinion as attached to the brief of the United States Attorney. I don't know if the Court has a copy of that before him now.

THE COURT: A copy of the brief of the United States Attorney?

MR. MARIETTI: The U.S. Attorney.

THE COURT: Yes, I do.

MR. MARIETTI: On page 6 of the Giacalone opinion attached thereto, do you have that, your Honor?

THE COURT: Yes.

MR. MARIETTI: At the bottom of the page the Court says—

THE COURT: Wait a minute.

MR. MARIETTI: The bottom of that page the Court says: "Thus, we must accept the general rule that the absence of a showing of intentional governmental delay actual prejudice must be [8] demonstrated. . ." It doesn't say both.

In the paragraph preceding that, the Court says: ". . . we find no evidence that such delay was for the purpose of harrassment or to enable"—or in the alternative—"to enable the Government to gain some tactical advantage over the appellee." It is an alternative proposition.

Now addressing ourselves to the question of prejudice in this case, I think it was very well stated by the concurring opinion of Justice Brennan and Justice Marshall in Dickey versus Florida, 398 U.S. 30, that in fact substantial prejudice is difficult to prove.

If you think about the logic of it, what logic is there in asking a man to assert substantial prejudice because he had forgotten things? If he has forgotten them, how does he know what he has forgotten? It is tautological. And the Court recognized that when they said substantial prejudice is difficult to prove, because how can a defendant reconstruct when he cannot remember?

You have here the fact of an unreasonable delay. There is no asserted valid reason by the United States Attorney, at least that I can glean from his brief. There is no valid reason for the delay.

[9] It is a fact that this defendant has had a difficult time remembering those charges and the details surrounding where he was and what h vas doing on those days, on Counts I and II. We are not here to complain about Count III, we are not here to complain about that. An arrest was made promptly in that case and the defendant has been afforded a fair chance, at least so far as his ability to recall the events at the time of the preliminary examination.

But why, why did they wait on Counts I and II?

We submit the only reason they waited was to further hamper this defendant's ability to assert his defense; and, secondly, to enable them to acquire a further hammer over this informant who admittedly already is obviously biased against this defendant, who is the only thing standing between him and the State's Prison. And we would ask that those two counts be dismissed, your Honor.

MR. SPIES: If it please the Court, I don't want to begin my argument by making excuses, your Honor, but this case has been handled through the investigatory stage right up through this point by one of my assistants, Robert Greene, who is at the hospital with his wife today. I lack some [10] knowledge of the background, but I am prepared to respond to the arguments as I heard them today.

The first question is, there is some speculation by the defendant about improper motives, but he suggests the very reasons why the narcotics' investigations are often delayed, that is, if an informant is being used in more than one—against more than one narcotics' dealer, there is often a delay. The law enforcement doesn't want to burn that informant, doesn't want to disclose that he has been an informant, number one.

Number two, it is certainly beneficial to accumulate more evidence. If the defendant—very often more counts will confirm. Obviously the defense will be that this man was a narcotics' agent, but the more counts, the more—the less likely this defense becomes.

There is a question as to the period January to March, and my date book indicates there wasn't a Grand Jury

available during that period, and this would—our office has not asked for Grand Juries to be brought in promiscuously over the past few months. Now we recognize that the Grand Jury, under the Speedy Trial Act, will have to be coming monthly or bimonthly, but in the past they have not brought in weekly or [11] monthly, and there appears to have been no Grand Jury from the time of the arrest in January, in late January, to the Grand Jury indictment returned in early March.

We are going to stand on the two Sixth Circuit cases, Ross versus United States, which is cited in our brief, and United States versus Giacalone, which we would suggest are the authority in this case.

Giacalone, particularly, has come down since the Supreme Court in Marion, and the Sixth Circuit had the benefit of that decision when it rendered its decision.

We feel those two cases are controlling here.

The Sixth Circuit made the point in Giacalone where a District Judge had dismissed in similar circumstances, to hold that it was an abuse of discretion to do so.

Finally, I think the most interesting factual point that has been raised by the defendant today is that defense counsel says this defendant was an undercover narcotics' officer; why, he dealt in so many transactions involving narcotics, how would he remember this one?

[12] Now, presumably the defense will be that he was working as an undercover narcotics' officer. Your Honor, if he was working as an undercover narcotics' officer when he dealt with the people who are involved in these counts, wouldn't he have made records of this? If he was an undercover narcotics' officer trying to make a case, he would have made a case report, as all good law enforcement officers would do. He wouldn't rely on coming back months later and making an arrest himself, unless he had made reports of this. And so now counsel is now telling us, "Why this man is an undercover narcotics' officer. He wouldn't have any reason to remember this dealing in narcotics, he deals so many times."

Well, your Honor, if he is dealing as an undercover narcotics' officer, he would make a report of it. He would

have his report and he could refresh his recollection from his report.

I think that the factual issue raised here to show prejudice pretty clearly shows the need of trying these three counts. So this is basically our position, that the very grounds they are arguing prejudice shows why these particular counts should be heard by this Court, number one. And number two, under the Sixth Circuit decisions, Ross and Giacalone, [13] that there has been no improper delay shown here.

MR. MARIETTI: Your Honor, I believe if I might respond, since I am the moving party, I would agree with the DA's characterization, that if this man is an undercover narcotics' officer, that he indeed would have records, and most certainly this man would have records because he kept very accurate records, unless of course it didn't happen, which is going to be the issue in the trial.

And I will take issue with his anticipating the defense, because you are dealing in this case with the word of a known Heroin peddler against this man, and that's what this case is going to boil down to, a man that now has four charges hanging on him. That is what the case is going to boil down to, and of course there wouldn't be reason to keep records if it never happened. That's my response to that argument.

I would, furthermore, if the District Attorney is attempting to assert a justification for this delay on the basis that this man, Mr. Jordan, who is the informant in this matter, was working another undercover in other undercover operations, I would ask him, if he can, to produce one other warrant that this man brought against any other defendant prior to the [14] time that his so-called cover was blown by the arrest of Mr. Scott, one other warrant. I will submit there aren't any. At least my investigation reveals that, not one. There absolutely was no justification for this delay.

Now the District Attorney further attempts to justify the delay between January and March on the basis of inability to convene a Grand Jury. There was no Grand Jury convened when John Scott was arrested in January,

there was no Grand Jury convened when he was complained against by the District Attorney's Office for an offence that occurred on September 22nd, which is Count II in this case. It was done by Complaint and Warrant. But yet they chose, as far as Count I goes, to wait after the cover was blown, and I submit that isn't even relevant here because there will not be another warrant that this man has made during that delay period, but they still chose to wait even after his so-called cover was blown. They could have proceeded by Complaint and Warrant at that time, but they didn't, and I would submit there has been no justification here for the delay, and it has worked to the prejudice of my defendant.

THE COURT: Do you have other motions now?

[15] MR. MARIETTI: Would you like me to proceed to the next motion, your Honor.

THE COURT: Yes.

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UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

G75-54 Cr.

[Filed Nov. 20, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN ARTHUR SCOTT, DEFENDANT

ORDER

A hearing having been held on the motions to dismiss Counts I and II, and to sever all counts to be tried, IT IS HEREBY ORDERED that:

1. The motion for severance is denied, and
2. The motion to dismiss is denied without prejudice, so that the defendant may reassert it if he chooses after all evidence has been presented.

Dated: November 20, 1975.

NOEL P. FOX
Chief Judge
United States District Court

CERTIFIED AS A TRUE COPY
Gerald H. Liefer
Clerk

BY /s/ J. G. Sale
Deputy Clerk

TRANSCRIPT OF TRIAL

[292]

• • • •

REDIRECT EXAMINATION OF STEPHEN YOUNG

BY MR. GREENE:

Q. Mr. Young, there was testimony about continued investigation after Agent Best is at Mr. Jordan's house —it [293] must be the second purchase; why didn't you arrest Mr. Scott at that time?

A. In narcotic investigations, we let them run. We don't arrest at the first time the crime has been committed. One has to see what stature a person has in the narcotic trade, whether he is just a run for somebody or whether he is actually the individual who is causing all this to happen.

Also that the investigation revealed that there may be other police officers involved in this. Also there was talk during the investigation that he had been ripping—

MR. MARIETTI: Well, I am going to object to this, your Honor. This is obvious hearsay evidence.

MR. GREENE: Your Honor, I would note that the question was asked before, what was the purpose, why didn't he ask, why didn't you arrest, he was asked several times. The Government would like the answer why he didn't arrest him.

THE COURT: Any hearsay testimony in this regard is stricken and should not be considered by the jury. That was hearsay testimony, rumors or what knowledge.

Q. Specifically within your own knowledge, why didn't you arrest him?

A. We wanted to continue the investigation. First of all, [294] this was Agent Best the first time around, and we generally, as a general rule, do not arrest on one occasion. You let it go two, three, four, five times to see exactly where the drugs come from.

• • • •

[297] MR. MARIETTI: I am going to renew the motions on the pre-indictment delay at this time and move

it on the record for a judgment of acquittal on all three counts.

THE COURT: I think that what you better do is have some more evidence before we can consider whether there was undue delay or any prejudice, otherwise you are in the position now where the arguments that you made before would be about the same?

MR. MARIETTI: I would offer to the Court and make a separate hearing on that issue at this time.

THE COURT: All right. Take the jury to the jury-room.

[298] (At 2:09 p.m. the jury was excused from the courtroom and the following proceedings were had:)

MR. MARIETTI: Your Honor, at this time the defendant, John Scott, would renew the motions that were previously filed in this case and denied without prejudice, to dismiss Counts I and II, for the preindictment delay in this matter. We submit to the Court, as we did at the time of the argument of the original motion, that based on the testimony we have heard here from Agent Young, which we didn't have at the time of the motion, that there was an intentional and deliberate delay on the part of the Government.

The case cited by the District Attorney in our original argument cited by myself, which I believe was the Giacalone case, G-i-a-c-o-l-o-n-e, indicated that in the absence of a showing of intentional delay on the part of the Government it was incumbent upon the defendant to show actual prejudice.

While I don't feel in this case that there is any absence of a showing of intentional delay on the return of these indictments by the Government, and under the holding of that case I do not feel it is incumbent upon this defendant to show actual prejudice, the potential for prejudice, as we stated to the Court at the time of our argument, is there, and that is contained [299] in our brief, as it was originally stated, and we feel that is sufficient based on the holding in Giacalone, for dismissal of these indictments given this testimony of Agent Young.

THE COURT: Mr. Greene.

MR. GREENE: Your Honor, the Government would note that there has been a more recent Sixth Circuit decision—I think it came down in the last ten days—on pre-indictment delay, which the motion was denied. I think it was after seventeen months. Since I did not expect to argue this today, I did not pick up the latest case. However, I would also note that all the cases in reference to the pre-indictment delay, or delay at any time, allows for reasons for the Government to delay, I think the continued investigation in a narcotics case is one of the reasons stated; suspects, other suspects, other opportunity to obtain drugs. And all these have been recognized as a reasonable reason for a delay in that case.

And, again returning to the Sixth Circuit case, I still contend that actual prejudice must be shown. To go back to the old Sixth Circuit ruling, it used to be the Statute of Limitations, which was modified over the last eight months; two, the showing that there must be prejudice. Based on the recent decisions of the Sixth [300] Circuit, it just hasn't been shown. The Government had ample reason to continue the investigation for a longer period.

And, finally, seven months is not long. I think the Sixth Circuit in the cases before them so far has ruled twenty-five months does not necessarily indicate a dismissal. Definitely seven months would not fall under that.

For those reasons I would ask it be denied.

THE COURT: In the present status of the case and the apparent law in the Sixth Circuit, I will have to deny the motion.

Proceed.

MR. MARIETTI: I take it is denied without prejudice at this point to renew it?

THE COURT: Yes.

MR. MARIETTI: Your Honor, at this time the defendant, John Arthur Scott, would move for a judgment of acquittal on all three Counts in this case.

We have heard testimony in this case with regard to alleged delivery of certain drugs, to-wit, codeine, cocaine, and heroin.

The testimony, as to the observation of those alleged deliveries, has come solely from the mouth of Robert Jordan in every case, a paid informant, an infor- [301] mant who has no less than four charges at this time hanging over his head, one of which was brought by this Officer.

There is absolutely no evidence—

THE COURT: Aren't these questions of fact which go to the jury and not for the Judge to decide? The Judge can't make decisions on the fact issue. That is solely within the province of the jury.

Are you saying that the Government's evidence is insufficient to create an issue of fact to go to the jury?

MR. MARIETTI: I am saying I would like a ruling on that issue when we have this type of testimony from a paid Government informant who is—

THE COURT: That is a question for the jury.

MR. MARIETTI: With the charges hanging over his head, the Court is ruling that is a question for the jury alone?

THE COURT: Yes, that is a question for the jury.

MR. MARIETTI: Fine. I take it my motion is denied?

THE COURT: Yes.

MR. MARIETTI: Very well.

[302] THE COURT: I can't see any straight proposition of law which would support a motion for a judgment or his acquittal at this time. The status of the record at the present time is such that if you were to rest now I would have to submit it to the jury to be decided. I couldn't do it myself.

• • • •

[403] Q. Do you recall where that was?

A. I met him at the—I met him at a bar, the Buckboard, I believe, Bar on Broadway in Muskegon. It was in Norton Shores.

Q. Were you offered any money at that time by Mr. Jordan?

A. Yes, sir.

Q. How much money did Bobby Jordan offer you?

A. He originally offered me $3,000. Then he was talking about $10,000, and on this occasion he offered me $800.

Q. What did you do?

A. I refused.

Q. Were you wired at that time?

A. No, sir.

Q. Did you make a report of that?

A. No, sir—yes, sir. Correction, I did make a report.

Q. Is that one of the reports that have been marked as Defendant's Exhibits?

A. Yes, sir.

Q. Did you advise—strike that. Did you actually type the report up yourself?

A. Yes, sir.

Q. Did you actually submit it to Lieutenant Jurgens?

A. Yes, sir.

[404] Q. Have you ever accepted a bribe from Bobby Jordan, Officer Scott?

A. No, sir. No, sir, I never have.

Q. And you reported these items?

A. Yes, sir.

Q. After this attempt by Bobby Jordan to bribe you, did you ever have any more contact with him?

A. After a period of time, yes.

Q. Do you recall what the reason for the contact was?

A. Yes, sir.

Q. What was the reason?

A. Robert Jordan wanted to work for me.

Q. Did he state why he wanted to work for you?

A. Yes, sir.

Q. What did he say his reason was?

A. Because he knew that I was instrumental in his being arrested in Grand Haven, and he had the charge pending on him in Grand Haven, and he felt if he worked for me and he was proven reliable and supplied me with a number of good busts, he wanted me to write a letter of recommendation to the Prosecutor and the Judge in Grand Haven.

Q. Now when you say "bust," what does that term mean? We are not familiar with that term, Officer Scott.

A. Well, this is street language for arresting a party, taking off a house. It they got drugs, you go in and you arrest [405] all the people in there. And people you know dealing, you arrest them for possession, and people that are just visiting, you arrest them for frequenting.

Q. Did you do any surveillance or investigation of Bobby Jordan?

A. Yes, sir.

Q. Had you made your fellow officers aware of your investigation of Bobby Jordan?

A. Yes, sir. We had conversations about Robert Jordan's activities almost daily.

Q. You have sat here patiently and listened to the accusations that Bobby Jordan made the other day, didn't you?

A. Yes, sir, I did.

Q. Do you recall—I believe he used the date of September 10th—where you were on September 10th?

A. No, sir.

Q. You have no recollection?

A. No, sir.

Q. Have you tried to remember where you were?

A. Yes, sir.

Q. He also mentioned the date of September 19th. Do you have any recollection of where you were on the 19th?

A. No, sir.

Q. Have you tried to remember that, too?

A. Yes, sir.

[406] Q. Do you have any recollection of where you were on the 20th of September?

A. I have heard that date mentioned in here, but I have no recollection, no.

Q. Did you ever have any phone conversations with Mr. Jordan?

A. Yes, sir, many times.

Q. Many times?

A. Many times.

Q. Did there ever come an occasion when you discussed with him on the phone any particular bust that you wanted to be involved with?

A. Yes, sir.

Q. Were you ever investigating a bust involving a large shipment of marijuana?

A. Yes, sir.

Q. Do you ever recall discussing that particular bust with Bobby Jordan?

A. Yes, sir. He was involved in this, he was involved in the investigation.

Q. Did you ever discuss this on the phone with him?

A. I may have, yes.

Q. Do you recall having a telephone conversation specifically on September 20th?

A. No, sir, I do not.

Q. Do you recall what the nature of this shipment or bust [407] regarding this shipment was?

A. Yes, sir. I can remember some parts of it. It is kind of sketchy, but I do remember the incident, yes, sir.

Q. What do you remember about it, Officer Scott?

A. Robert Jordan and I had had some conversations previously, and we had discussed the possibility of going into a partnership with another gentleman who was to order from Mexico a semi-truck of marijuana.

Q. And what was the arrangement in terms of a purchase price for that truckload?

A. We were to put up $5,000 apiece.

Q. Who is we?

A. Robert Jordan and the other party that was to be involved in it and myself.

Q. Now, why did you want to be involved in this situation?

A. I was interested in taking the truck off when it came off. By that I mean arresting the driver for possession and delivery, and also the other party for conspiracy to transport marijuana across the state lines.

Q. And how much were each of you required to put up?

A. Five thousand.

Q. Now was it your intention to actually put up $5,000 and purchase drugs yourself?

A. No, sir.

Q. Did you attempt to lead Jordan on to believe that?

[408] A. Yes, sir.

Q. Did Jordan ever ask you to produce any drugs for this third party? If you don't remember, say so. If you do, say so.

A. I don't think so. He may have. He may have asked me to actually flash some, I don't know.

Q. Did you ever indicate to him that you would flash drugs?

A. Yes, sir.

Q. Did you in fact ever do that?

A. No, sir.

Q. Why did you tell him you would, Officer Scott?

A. Because in the type of work that I was dealing in, it was quite common at times where individuals will ask you these things, and where they would place objects on the table, they ask you to hand them to them, they want to see if you have got anything, and you have got to be prepared.

Q. Like the time when he asked you to pick up the packet and you wouldn't?

A. Yes, sir.

Q. And you are stating you may have discussed that situation on the telephone and you may not have, you can't remember?

A. I don't really remember. We may have discussed that.

Q. Now you said you can't recall where you were on the 10th or the 19th or the 20th; do you recall September 24th, [409] that date specifically?

A. I remember some at the—some parts of September 24th.

Q. You have heard the accusations that Bobby Jordan made surrounding that date, haven't you?

A. Yes, sir.

Q. Do you actually remember that date or do you remember some of the incidents that happened that day?

A. I remember the incidents that happened on that date.

Q. Do you recall receiving a telephone communication from Bobby Jordan on that date?

A. Yes, sir.

Q. How is it that you remember some of the things that happened on that date but you can't remember these other dates?

A. Well, on this day, I don't remember the day or the date, but I remember the incident because on this particular date he asked me to do some specific things.

Q. Did you ever make any notes on that transaction?

A. Yes, sir.

Q. Do you have those notes with you?

A. No, sir.

Q. Did you have an opportunity to review them?

A. Yes, sir. The notes were—all my notes and records and everything were confiscated by my attorney and Lieutenant Rudy Jurgens so they couldn't be altered in any way at [410] that time. But, however, subsequent to that I was allowed to review the notes.

• • • •

[556] (THE DEFENDANT RESTED.)

MR. GREENE: The Government has no rebuttal witnesses, your Honor, so the Government also rests.

(THE GOVERNMENT RESTED.)

THE COURT: All right. We have some motions, and so the jury will be excused until 9:30 tomorrow morning, and we will go ahead with the motions.

Remember, don't talk to anyone about this case or read any newspapers or listen to any TV's or radios.

(At 4:35 p.m. the jury was excused from the courtroom, and the following proceedings were had:)

THE COURT: You may proceed.

MR. MARIETTI: Your Honor, at this time the defendant would renew the previous motions filed preliminary to trial and renewed at the conclusion of the Government's case, to dismiss Counts I and II on the basis of a denial of due process for the pre-indictment delay.

We have already set forth to the Court a written argument on this particular point. We have orally argued it to the Court at a pretrial hearing, and we argued it briefly to the Court at the conclusion of the Government's proof. The Court at that time expressed its desire to hear further proofs before deciding the [557] motion.

We submit, your Honor, quite simply, that based on the testimony that was elicited from the Government's agents in this matter, there is no question but that the delay of the Government was both deliberate and intentional in this matter.

We submit that the prejudice to the defendant was rather obvious today when he took the stand and was forced to say on direct examination—I don't know how many times—"I don't recall." "I can't remember." And it is particularly significant, your Honor, that his recall of the events surrounding the day that he was arrested, as the Court may have observed, were rather precise, correct, and to the point.

However, as to the 24th, as charged in Count II, as to the 20th, as charged in Count I about which we have never heard testimony before prior to the commencement of this trial, and to all those other transactions that were admitted into this record about delivery of alleged controlled substances by Mr. Scott to the informant, he simply can't recall anything about those dates. He knows he never delivered drugs, but he can't recall.

I think it was obvious to the Court that he was being honest, because when he could recall something, [558] he was quite direct about it.

Now the Government's case is—with regard to Counts I and II, as they stated in their opening argument and as they have presented the evidence, involves an intricate set of facts and an allegation of a scheme or a plan or a connected series of transactions which involved Officer Scott, stretching back to September 9th or 10th all the way up through and culminating the 24th, and the de-

fendant has expressed over and over and over again his inability to recall, and we suggest that that is a result of the delay, a delay that was unjustified, intentional and deliberate.

As the Court cited or as I have cited in my cases, it is ridiculous or tautological to consider the question or to put the defendant in the position of trying to state to the Court what he could not remember. Obviously if he can't remember it, he doesn't know what it is that he can't remember. And to probe that question would be merely tautological inquiry, and we submit to the Court there is ample evidence of serious prejudice and substantial prejudice of this defendant to rebut or to present facts rebutting the theory of the prosecution with regards to Counts I and II, which was this series of events which were never brought to the attention of this defendant prior to the commencement of this trial, [559] and we submit that as result of the delay there was substantial prejudice to this defendant, and we ask that those first two Counts be dismissed on that basis.

THE COURT: Where is the file in this case?

(The law Clerk handed the Court a file.)

MR. MARIETTI: I would add further, your Honor, that the most recent case that I have been able to find on this subject is United States versus King, 521 Fed. 2d 356, which is a Sixth Circuit case. I believe it was reported in November of this year.

THE COURT: What is the—521 Fed. 2d—what is it?

MR. MARIETTI: 356.

THE COURT: Three fifty-six?

MR. MARIETTI: Yes. Which merely sets forth a proposed test for evaluating need for a dismissal.

THE COURT: All right:

MR. GREENE: In response, your Honor, the Government would note, first, there is a balancing test. There has been testimony of the reasons that Mr. Scott was not arrested on the 20th, on the 24th. An investigation was continued. This testimony was heard by the Court, and the Government need not elaborate on it further.

[560] There was also testimony by Mr. Scott with reference to the transaction on the 24th, which was quite detailed, in reality. He did testify that in reference to the 20th he had no recollection of it, and he specifically testified he had a number of meetings with the defendant, which he cannot recollect in time, dates, a number of telephone calls.

His testimony on the 24th was very specific, and this in itself, the Government would contend, would remove any so-called prejudice on this particular date.

In reference to the 20th, there is the testimony that at no time did he take any drugs, give any drugs to Mr. Jordan, and this he has maintained throughout, no matter what date you chose.

So the actual defense, he is, the defendant is saying it never occurred.

Since you have a balancing test to begin with and ripe for continuing investigation to go on, since in this case the defendant denies explicitly, very explicitly, since the charge is very explicit, since he does have a good recollection of the time on the 24th and what occurred and has testified to such, the Government would contend the prejudice sought has not been reached particularly under the case law, for the reasons the Government has testified to, the continuation of the [561] investigation, the need for it, does establish the right not to arrest the individual at that time, to continue the investigation till a later date.

Finally, the Government notes there is no Federal law, no Federal case known at this time that states seven months, which this would be, September—actually about six months, six months and two days, that this is too long of a time not to arrest and charge a man and indict him. It just does not know of any case at this time that considers this particular period of time is too long, and shows the prima facie cause of prejudice before—the Court needn't consider looking into the matter beyond that point, because on the facts and the testimony the Government contends the motion is without merit and should be denied.

THE COURT: You may respond.

MR. MARIETTI: Well, your Honor, if a justification for the intentional delay and deliberate delay by the Government is for the purpose of accumulating more and more charges against the defendant, then so be it, if that is the justification, "for the purpose of accumulating more charges." But we submit to the Court that this is not simply one or two or three isolated incidents. As I said previously, they have submitted that this is a series of transactions culminating on the [562] 24th. Officer Scott did testify to certain events as he could recall on the 24th, yes, he did. As to how explicit he was, I suppose I would differ with the prosecution, but I would say that that transaction on the 24th was not the only event involved in the theory of the prosecution's case, and these other transactions were.

Now it so happened that Officer Scott, when he was finally permitted to look at his notes not long ago, could remember some of the things that happened on the 24th, but the point is the series here to establish this series of transactions running up to the 24th, and that certainly is evidence that is going to be admitted or it has been admitted bearing upon the existence of a motive or a scheme or a plan through a series of transactions with this defendant, and we submit that his inability to recall, as he stated on the witness stand, is prejudicial and it certainly cannot be justified by the Government's desire to continue to accumulate charges against the defendant.

THE COURT: All right. I will announce my opinion tomorrow morning before the oral arguments. And the oral arguments, we will start the case tomorrow morning at 9:30.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 76-1382

UNITED STATES, PETITIONER

v.

JOHN ARTHUR SCOTT

ORDER ALLOWING CERTIORARI

Filed October 11, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

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No. 76-1382

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR JOHN ARTHUR SCOTT

William C. Marietti

820 Terrace at Clay
Muskegon, Michigan 49440

Alexis J. Rogoski

710 Hackley Bank Building
Muskegon, Michigan 49440

Attorneys for Respondent

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BRIEF FOR JOHN ARTHUR SCOTT

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this cause is reported at 544 F.2d 903.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Should the Government be permitted to subject the respondent to another trial on one count of a three count indictment when that count was dismissed by the court at the conclusion of presentation of all of the evidence at trial and the jury found the defendant not guilty of another count charged in the same indictment?

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The respondent accepts the statement of the petitioner as to the relevant laws and rule.

STATEMENT OF CASE

On January 22, 1975, John Arthur Scott was arrested on two complaints authorized by the United States Attorney charging him with distribution of codeine on September 24, 1974, and heroin

on January 22, 1975. A preliminary examination was conducted on February 18, 1975, as to both charges. On March 5, 1975, the grand jury returned an indictment with counts covering the charges contained in the complaints. In addition, another charge was added referred to as Count I. That count alleged distribution of cocaine on September 20, 1974. Count I is the subject of the petition herein.

On April 8, 1975, respondent filed a timely motion to dismiss Counts I and II, the September 20 and 24 allegations, due to pre-indictment delay. Counsel for the respective parties submitted briefs on the motion and oral argument was presented. The court denied the petition without prejudicing the respondent from renewing the motion after evidence was presented at trial.

The government's case as to Count I consisted of the testimony of a paid informant that he had received cocaine from the respondent while the two were alone in his residence on September 20, 1974.

Mr. Scott testified that he was an undercover officer for the Central Narcotics Unit of Muskegon County, Michigan. He indicated that he knew the informant because he had conducted an investigation which had culminated in the informant's arrest on a charge of possession of heroin in May, 1974.

The respondent testified in detail regarding the allegations of January 22, 1975. His testimony was corroborated by several other witnesses who confirmed that the informant had been boasting about the fact that he had "set up" Officer Scott.

As to the September 24, 1974 incident, the respondent was the only witness on his behalf. He related the facts surrounding that allegation with less specificity than the January 22 incident.

As for the allegations in Count I, again, Officer Scott was the only witness on his own behalf. However, unlike the other counts, he was unable to recall any of his activities on September 20, 1974. He did deny ever delivering drugs to the paid informant. At the conclusion of the presentation of the government's case, the respondent renewed the motion for dismissal based on pre-indictment delay. The court, again, denied the motion without prejudice to renew it at the conclusion of all of the proofs.

Consequently, after Officer Scott testified he had no recollection of the September 20, 1974, events and all of the evidence from both sides was presented, the motion to dismiss was renewed. After hearing all of the evidence presented to the jury, the judge ruled on the motion and dismissed Counts I and II. The jury thereafter acquitted the respondent as to Count III.

After receiving an extension of time for filing notice of claim of appeal, the government appealed the court's decision regarding Counts I and II. The Sixth Circuit Court of Appeals dismissed the appeal and affirmed the judgment of the district court. A petition for rehearing was denied.

REASONS FOR DENYING PETITION

The apparent basis for the petition by the government that review would be appropriate in this case is that it is the precise issue reserved by the court in Serfass v United States, 420 U.S. 377, 394. (Br. 6). In addition, the petitioner claims that the court has not adequately considered this issue in the only other decision involving remotely similar facts, United States v Wilson, 420 U.S. 322. Finally, the government contends that the circumstances of United States v Martin-Linen Supply Co., No. 76-120, decided April 4, 1977 are so dissimilar that the court's opinion in that case is not applicable. (Br. 6).

Without extensive elaboration on the lack of merit in the government's petition, the respondent submits that the aforesaid reasons for review are invalid. The petitioner's interpretation of the applicability of Wilson is essentially correct. The case is clearly distinguishable because of one significant point. In Wilson, the dismissal of the charge by the court occurred after the jury had

returned a guilty verdict. A reversal of the trial judge's ruling on appeal would not have subjected the defendant to another trial since the jury verdict would have prevailed. In the instant case, any reversal of the judgment of the trial court would necessarily require a second trial.

The respondent submits that the opinion in Wilson permitting appeal hinged upon this significant distinction in facts. The court was mindful that the thrust of the Double Jeopardy Clause was to block a second trial with all of the attendant anxiety and expense which befalls the defendant. The opinion concluded that appellate review was appropriate in Wilson because it would not raise the possibility of these undesirable consequences to the defendant nor would it afford the government any tactical advantages in its prosecution. But for the fact the second trial was not necessary, the Wilson court would have denied appellate jurisdiction. This conclusion is implicit in the court's reasoning underlying its decision. Id.at 352.

Applying the implications of Wilson to the instant case, it is clear that appellate review is inappropriate. Should a reviewing court determine to set aside the trial judge's ruling, the respondent would be forced to stand trial once again on Count I. This is precisely the result that the Double Jeopardy Clause shields against since Officer Scott has already faced the expense and anxiety of a

trial on Count I. All evidence was presented by both sides in the first trial of this case, and a retrial would provide the government with an opportunity to re-examine the weaknesses in its first presentation. This is condemned by Wilson. Id.

As for the contention that Serfass reserved the issue at bar in this case, respondent submits the government has seriously misinterpreted the opinion therein. The issue not decided in Serfass was whether government appeal is permitted where a defendant is afforded the chance to have a pretrial ruling of a legal defense and deliberately defers raising the issue until after he has been placed in jeopardy. 420 at 394. That hypothetical is inapposite to the facts herein. The respondent filed a timely motion to dismiss Count I for pre-indictment delay several months prior to trial. There was no deliberate effort to defer the issue until after jeopardy attached. The motion afforded the government and the judge ample opportunity to resolve the issue prior to commencement of trial. Furthermore, the respondent renewed the motion before he introduced any proofs, and the court denied the motion again without prejudice to renew at the conclusion of all proofs. It is difficult to imagine what respondent could have done to more diligently and appropriately pursue the issue. The problem was raised at every opportunity and does not involve the deliberate delay situation reserved in Serfass.

The respondent submits that the court has given the bench and bar adequate guidelines to dispose of the questions herein through its recent decision in United States v Martin-Linen Supply, No. 76-120, decided April 4, 1977. The petitioner erroneously seeks to distinguish Martin-Linen by noting that it involved an "acquittal". (Br. 6, n.2). Assuming, arguendo that this case did not involve an acquittal and Martin-Linen did, that is not a distinction of any consequence. This court has ruled that the particular nomenclature attached to the action taken by the lower court has no relevance to deciding the applicability of the Double Jeopardy Clause. United States v Sisson, 399 U.S. 267. Rather, a reviewing court must examine the basis for the decision in the lower court in order to determine whether the action was, in fact, an acquittal which would bar further prosecution. The test developed by Sisson is that the trial court's action must not be based on any matters not apparent on the face of the indictment itself. Id. In order to avoid application of the Double Jeopardy Clause, the issue raised by the defense must be capable of determination without trial of the general issue and litigating the facts surrounding the commission of the alleged offense must be of no assistance in determining the validity of the defense. United States v Covington, 395 U.S. 57.

The facts in the instant case should be analyzed with Sisson in mind. It is clear that the trial judge wanted to hear the

evidence in the case to assist in deciding whether to dismiss or acquit the respondent. The order denying the pretrial order indicated,

> "the defendant may reassert it if he chooses after all evidence has been presented." (App. A, infra).

In fact, the court considered evidence presented by both sides at trial concerning the nature of Officer Scott's work, the circumstances surrounding his assignment to the narcotics squad, the demeanor of the witnesses testifying, the impairment of recall of events by both the respondent and the informant and based his decision "solely out of the peculiar circumstances of this case". (App. B, infra). This type of analysis by the trial court had all of the incidences of an acquittal. Thus, Martin-Linen principles would apply in this case.

Petitioner's brief refers to several factors which are considered by appellate courts in evaluating the applicability of the Double Jeopardy Clause. These considerations, in the instant case, are decisively resolved in favor of shielding Officer Scott from a second trial. (Br. 8) The motion was diligently presented before trial. The court's decision was obviously based upon evidence presented at trial. The cases cited in the government's brief indicate that the factual situation herein prohibits a retrial of the respondent.

The petitioner seeks to have this court reverse its previous position as to the purpose of the Double Jeopardy clause which is,

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply ingrained in at least, the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." Green v United States, 355 U.S. 184, 187-88 (1957).

The government argues that the court should abandon its position in Green and adopt the viewpoint that the primary purpose of the Double Jeopardy clause is to secure to a defendant the right to have a verdict from a particular factfinder. (Br. 8). This is contrary to the above-cited quotation from Green. Moreover, whatever validity this argument may have as it relates to a mistrial situation, such is not the case here. The ruling of the judge in this cause was not based upon misconduct or error arising during the course of the trial. The fatal error in this case actually occurred long before commencement of the trial with the unreasonable delay before indictment. In that sense, the issue of obtaining a verdict from a particular factfinder is not relevant. There

was no error at trial which so contaminated the particular jury involved as to require a mistrial. The facts which led to dismissal in this case were legitimately presented to the jury. If there were a retrial, the same facts could be properly injected into the case before a different petit jury. Thus, the premise of the government's contention as to the purpose of the Double Jeopardy Clause is not relevant to the circumstances of this case.

Petitioner requests this court to change its position in Green and hinge the applicability of double jeopardy on one factor stated in the government's brief in support of its petition in Lee v United States, No. 76-5187: whether the accused surrendered his right to receive the empaneled jury's verdict by request or agreement. (Br. 8). This proposition initially fails because, as noted in the previous paragraph, it misinterprets the rights protected by the Double Jeopardy Clause as stated in Green. Moreover, the facts in Lee are significantly different from the instant case. Lee actually addresses itself to the question reserved in Serfass -- the effect of the accused's deliberate delay in raising a legal defense until after jeopardy has attached. In Lee, the defendant elected not to raise the motion for dismissal based on a defective indictment until after the trial had commenced and was chided by the trial court for that tactic. (Lee, Br. 2). Certainly the government's contention that the accused should not complain of double jeopardy is

more attractive where he has deliberately deferred a motion more appropriately raised before trial. The defendant in Lee was able to control his own destiny. That type of legal defense, a defective charge, can be considered by looking at the face of the indictment alone. Under those circumstances, the opinion in Sisson would suggest that a retrial would not be barred since it was not necessary to go beyond the face of the pleadings to rule on the motion. The issue could have been raised and decided at any time, and the accused's tactics in Lee are vulnerable to criticism.

However, in the instant case, the respondent proceeded with diligence in pursuing his defense of unreasonable pre-indictment delay. The accused presented a motion for dismissal based on this defense prior to trial and requested a hearing thereon. In Lee, the government acknowledged there would have been merit to the accused's claim of double jeopardy if he had filed a pretrial motion. (Lee, Br. 32). Pursuant to respondent's request herein, a pretrial hearing was held and the motion was denied, but the court did not prejudice his right to renew the motion after all evidence was presented. Officer Scott did not ask that the ruling on his motion wait until after jeopardy had attached by completing presentation of evidence to the bench and jury. He asked the judge to rule before trial. The court refused the request. At that point, the respondent relinquished control over his destiny to the court.

Thus, the government cannot seriously contend that the accused elected to have a ruling at the time the court chose to dismiss Count I. The respondent was actually forced to undergo the trial before his motion would be ruled upon. The only alternative to renewing the motion after all evidence was presented would have been to abandon this constitutional due process defense entirely. Certainly, the government would not suggest that the accused should have been required to elect to forfeit his constitutional right to due process of law.

In fact, the government's suggestion in its brief that respondent elected the course of action followed by the trial judge is somewhat inconsistent with its position in United States v Lovasco, No. 75-1844. In its brief supporting its petition in Lovasco, the government admits that a motion for pre-indictment delay cannot properly be heard until all evidence has been presented at trial due to the peculiar nature of that legal defense. (Lovasco, Br. 40). This position, that the motion cannot be heard until after proofs are concluded, directly refutes the notion that the respondent chose to defer ruling on his motion until that point. If the government relies on Lovasco in support of its petition herein, it has, thereby, distinguished the case from Lee which did involve facts affording the accused an option in timing his motion. The petitioner cannot rely on

Lavasco and look to Lee for support with any semblance of logic or consistency.

The government suggests that the respondent forfeited the protection of the Double Jeopardy Clause by not deferring ruling on the motion until after a verdict had been rendered. Initially, this proposition assumes that the onus is on the accused to orchestrate the case in such a fashion as to preserve the government's privilege to appeal. The petitioner cites no authority for that assumption and, indeed, there is none. The government was represented at the pretrial hearing and the trial. Thus, the United States attorney had opportunities equal to those of the respondent to request that the judge defer his ruling on the motion until after a verdict. Certainly the accused does not bear the burden of safeguarding the government's interests as well as preserving his own rights. If any party had the responsibility to avoid the application of the Double Jeopardy Clause, this obligation clearly rested with the government.

The other aspect of the government's position that is not realistic is the notion that either party had the option to defer ruling on the motion until after the verdict. This is a prerogative which is reserved to the trial court. F.R.C.P. 12. Neither party can control that aspect of the case. One can only request. This was done by the accused when he presented the motion for a

ruling before commencement of trial. The court made it abundantly clear to both parties that any renewal of the motion was to be made "after all evidence has been presented". (App. A. infra). When the respondent attempted to renew the motion at the conclusion of the prosecution's case, the judge, again, denied the motion while reserving the accused's right to renew it after all evidence was presented. The order did not say the motion could be presented after a verdict, but rather after all evidence was presented. (App. A, infra). The accused acted with diligence in presenting his motion as early as possible and at every possible opportunity thereafter. Surely, he should not run the risk of denial of the motion for lack of timeliness by delaying until the last moment. It is, indeed, ironic that the government should contend that the accused's failure to bring a motion before trial in Lee should warrant a second trial and, at the same time, argue that the respondent should be stripped of the protection of the Double Jeopardy Clause when he made his motion before trial.

CONCLUSION

The petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

William C. Marietti

June 15, 1977

Alexis J. Rogeski

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
NOV 20 1975
Gerald H. Lieter, Clerk
WD South

UNITED STATES OF AMERICA,

Plaintiff,

v. G75-54 Cr.

JOHN ARTHUR SCOTT,

Defendant.

- - - - - - - - - - - - - - - - - -

ORDER

A hearing having been held on the motions to dismiss Counts I and II, and to sever all counts to be tried, IT IS HEREBY ORDERED that:

1. The motion for severance is denied, and
2. The motion to dismiss is denied without prejudice, so that the defendant may reassert it if he chooses after all evidence has been presented.

Dated: November 20, 1975.

NOEL P. FOX
Chief Judge, United States District Court

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BY J. H. Sales DEPUTY CLERK

COURT'S OPINION FROM THE BENCH

THE COURT: The Defendant has renewed his motion to dismiss Counts I and II based on the delay between the date the offenses are alleged to have occurred and the time he was charged.

I hereby grant the motion to dismiss with respect to Count I.

The Defendant testified with a good deal of specificity as to the occurrence on September 24, 1974, that is, the alleged offense in Count II.

In the Count with respect to Count I involving an alleged offense of September 20, 1974, the Defendant was able to give only a general denial. He could not recall the specifics of what happened on that date. I find the prejudice shown with respect to Count I caused by the preindictment delay was sufficient to result in the dismissal of that Count.

I note that the Defendant's testimony was given before the jury considering his guilt or innocence and not simply presented in separate hearing before me.

In addition, it is not insignificant that Bobby Jordan also had some difficulty remembering the details of the September events, even though he had the benefit of written statements.

Furthermore, the difference in the Defendant's ability to recall events of September 20th and events of September 24th is not without reason. When the Defendant was arrested on January 22, 1975, a Complaint charged him with the offense alleged that occurred -- alleged to have occurred on January 22, 1975 and September 24, 1974. The indictment returned by the Grand Jury on the 5th of March, 1975, added the September 20th offense. This additional delay can explain the differences in the Defendant's ability to recall.

The Government is correct in stating that the issue of preindictment delay is one of balancing of interests. However, as stated above, in this case a balance of those interests results in the dismissal of Count I.

The problem is to determine how much, if any, prejudice need be shown, based on the Government's reason for the delay. The quantum of prejudice which need be shown will vary with the circumstances. U.S. versus Marion, cited in 404 U.S. Supreme Court 307, 1971. For delay which is completely unintentional a defendant will have to show at least substantial actual prejudice.

On the other hand, if the delay is caused by the Government, intending to prejudice the Defendant's opportunity to present a defense, only a minimal amount of prejudice, if any, may be required. In between these two

extremes will be a variety of instances of intentional but legitimate delay. See, for example, United States versus King, 521 Fed. 2d 356, 6th Circuit case. Each case must be considered on the basis of the totality of the circumstances peculiar to it. U.S. versus Marion, supra.

Here the reason for the delay was principally to gain tactical advantage over this Defendant -- to gather more evidence of alleged offenses by him. Obviously the more charges which can be brought against one defendant in one proceeding the more likely the jury will not believe an innocent explanation of a single count or a single charge. Prejudice to the Defendant's ability to present his defense was not intended, but such was the result of Count I.

I want to repeat and emphasize the delay here was the result of the Government's intentional choice, with the principal motive being to gather evidence of further crimes, further alleged crimes by the Defendant in order to gain a tactical advantage at the trial. In such a situation the Defendant may show a lesser degree of prejudice to justify dismissal than where the reason for delay is neutral as respects the particular defendant charged.

I do not decide whether the degree of prejudice shown here would be sufficient for dismissal if the reason for delay was neutral. I hold only that since the delay resulted primarily from an attempt to gain a tactical

advantage, this Defendant has presented sufficient proof of prejudice with respect to Count I.

However, evidence of the charge involved in Count I is admissible to the same extent as evidence of any other alleged criminal action by the Defendant. See U.S. versus Jones, the Federal Rules of Evidence for the United States in the United States Courts 405.

The Defendant's denial of ever having distributed narcotics tempers the delay-induced prejudice sufficiently to allow evidence to be received as relevant to the other charges.

I am still a little concerned about September 24th because of some of the totalities of the circumstances in this case. Here is a black officer, the only black officer ever to serve in the unit. He was denied help when again and again he asked for help. That is a jungle out there. The Defendant's theory is that he was left alone, and being left alone he had to devise his own means of surviving in that jungle, and that he was in the process of trying to eliminate what he contended was a big operator, the Government's informant Jordan.

There is evidence in the record from which the jury can conclude that the Defendant's evidence was correct.

One of the problems is, in this case, as I see it, is the very heavy burden which the Defendant had to

carry when he was in that jungle. And what -- here was an officer. He was brought up from the patrol and tossed into the thicket of a highly sophisticated area of activities. And of all of the things he had to try to remember in that kind of a circumstance he may have forgotten crucial testimony essential to his defense.

I am going to dismiss Count II, as well.

I am not setting a precedent in that regard. I am doing it solely out of the peculiar circumstances of this case. The Defendant in this case should not have been out there in that jungle alone. And what I am concerned about is a compromise verdict which may result if he were to be -- had to stand trial all the way on the three counts.

And it is so ordered.

- - - -

REPORTER'S CERTIFICATE

I hereby certify that the foregoing is a true and accurate transcript of the proceedings in the aforementioned case.

James L. Reinardy
Court Reporter

- - - -

Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

No. 76-1382

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
SIDNEY M. GLAZER,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 544 F. 2d 903. The oral opinion of the district court (Pet. App. 6a–10a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) was entered on November 23, 1976. A timely petition for rehearing was denied on February 8, 1977 (Pet. App. 5a). On March 2, 1977, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including April 9, 1977. The petition was filed on April, 8, 1977, and was

granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a second trial of a defendant after the court, at the defendant's request, dismissed the indictment during trial on the ground that pre-accusation delay violated the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 12 provides in relevant part:

> (b) Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. * * * The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; * * *
>
> * * * * *
>
> (e) A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. * * *

STATEMENT

Respondent, a member of the Muskegon, Michigan, police force, was arrested on January 22, 1975, on a complaint charging him with two drug offenses. The complaint alleged that on September 24, 1974, respondent had distributed codeine (a derivative of opium), and that on January 22, 1975, he had distributed heroin. On March 5, 1975, he was indicted on these charges and on a charge of distributing cocaine on September 20, 1974 (A. 3–4). The September 20 transaction was the basis of Count I, the September 24 transaction the basis of Count II, and the January 22 transaction the basis of Count III. All of the transactions were alleged to violate 21 U.S.C. 841(a)(1).

Respondent moved before trial to dismiss Counts I and II on the ground that the delay between the commission of the offenses and the first accusation (five and one-half months for Count I and four months for

Count II) violated the Due Process Clause of the Fifth Amendment (A. 5–6).[1] The district court held a hearing on this motion (A. 7–14) and denied it, but without prejudice to renewal at a later time (A. 15).[2]

Respondent's trial began on December 1, 1975. The evidence presented by the prosecution showed that, on the dates charged in the indictment, respondent, a member of the narcotics unit of the Muskegon police force, had gone into the drug business for himself and was distributing drugs to Robert Jordan, an informant for the Drug Enforcement Administration (Tr. 11–32, 166–174).

At the close of the prosecution's case, respondent renewed his motion to dismiss Counts I and II because of pre-accusation delay (A. 16–18). He made that request shortly after Agent Stephen Young testified that the investigation of respondent had been continued to determine whether other police officers were involved in drug transactions, to ascertain the source of respondent's drugs, and to allow the purchase of drugs from respondent by a federal agent rather than by an informant (A. 16; Tr. 292–294). The court again denied this motion (A. 18). It also denied a motion for a judgment of acquittal, concluding that the testimony of Jordan created an issue for the jury (A. 19).

[1] The motion alleged that respondent was prejudiced because the delay prevented him and his witnesses from "accurately recollecting and reconstructing the events surrounding the offenses" (A. 5).

[2] The court also denied respondent's motion to sever the counts for separate trials (A. 15).

Respondent presented evidence tending to show that he dealt with Jordan only in the line of official duties. The theory of the defense was that Jordan had "set up" respondent so that Jordan would be able to traffic in drugs with less risk to himself. Respondent testified about the transactions of September 24 and January 22; he claimed, however, that he was unable to recall the events of September 20 (A. 21–24; Tr. 313–317, 323–324, 338–339, 353, 400–404, 515–519, 536).

After all the evidence had been received, respondent again moved to dismiss Counts I and II because of pre-accusation delay (A. 24–25). This time the district court granted the motion, ruling that Count I should be dismissed because intentional delay had prejudiced respondent. The prejudice, the court concluded, lay in respondent's inability to recall the events of September 20 (Pet. App. 6a–7a). The delay was impermissible, the court explained, because it was for the purpose of gathering evidence of further alleged crimes of respondent, which would give the prosecution a tactical advantage at the trial by making it less likely that the jury would believe respondent's explanation (*id.* at 8a).[3] The court also dismissed Count II.[4]

[3] *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, establishes beyond serious dispute that the district court's ruling was erroneous. See note 8, *infra*.

[4] The district court's reasons for dismissing Count II are not clear. The court stated (Pet. App. 8a–10a) that respondent should have been offered additional assistance in carrying out his police tasks, that the jury would be entitled to agree with respondent's version of the events, that respondent might have forgotten important evidence, and that "a compromise verdict * * * may result if [respondent] were to be—had to stand trial all the way on the

The court submitted Count III to the jury, which returned a verdict of not guilty (Pet. App. 2a).[5]

The United States appealed, seeking reversal of the dismissals of Counts I and II. The court of appeals dismissed the appeal for want of jurisdiction (Pet. App. 1a–3a). The court concluded that the Double Jeopardy Clause bars an appeal by the United States from an order entered during a trial dismissing an indictment.

SUMMARY OF ARGUMENT

This case involves neither an acquittal, which would preclude a second trial of respondent, nor a mistrial at defense request, after which a second trial unquestionably would be permitted. It falls somewhere in between. The district court did not evaluate the evidence of respondent's guilt; it held, instead, that he could not be convicted whether or not he was guilty. This case thus presents the question whether a pre-verdict

three counts." Because the reasons for the district court's dismissal of Count II are not clear (the concern about prejudicial joinder would have supported an order granting a mistrial but not an order dismissing the indictment), we have not presented for decision by this Court any question concerning Count II of the indictment. We do not concede, however, that a second trial on Count II would have violated the Double Jeopardy Clause.

[5] The district court instructed the jury, among other things, that it could find a "reasonable doubt" about respondent's guilt if it concluded that Jordan was either an addict or an informant (Tr. 647). Because Jordan was admittedly an informant, this instruction, which we believe to be erroneous, may have contributed to the jury's decision to acquit. The Double Jeopardy Clause bars review of acquittals by the jury, however, even if they are based on erroneous instructions, and we did not appeal from the acquittal on Count III.

termination of a trial bars a second trial where the termination is neither an acquittal nor the functional equivalent of a mistrial.

When, during the course of a trial, an accused willingly surrenders his right to receive a verdict, this choice ordinarily removes any barrier to a second trial. *Lee* v. *United States,* No. 76–5187, decided June 13, 1977; *United States* v. *Dinitz,* 424 U.S. 600. That rule reflects the fact that the defendant's most important double jeopardy right, once a criminal trial has begun, is "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn,* 400 U.S. 470, 486 (plurality opinion).

That interest is sufficiently weighty that a defendant who unsuccessfuly asserts his right to receive the verdict of the factfinder—*e.g.,* by opposing a mistrial declaration—may be retried only if it was manifestly necessary to end the first trial before verdict. But there is no need for special justification to "deprive" a defendant of a verdict he does not want to receive. Respondent's essential right was to receive a decision on his guilt or innocence. He elected, however, not to seek such a decision but instead to accept a termination of the trial for reasons unrelated to guilt or innocence. In such circumstances, weight must also be given to the important public interest in having a full and fair trial of the merits of criminal charges, and the Double Jeopardy Clause should not be held to bar a second trial if respondent was not entitled to the

relief he obtained when he accepted termination of the first trial.

To the extent this case is different from *Lee*, a second trial is even more appropriate here. In *Lee* a second trial was necessary because the prosecutor erred in drafting the information; here, we submit, the only error was made by the district court in granting respondent's motion to dismiss the indictment. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry respondent on what always has been a sufficient charge.

A defendent who desires to receive a decision on guilt without risking a second trial can do so by asking the court to submit the case to the jury and to postpone its legal ruling until after verdict. Once the case has been submitted, the defendant will receive a verdict of acquittal if one is forthcoming. If the jury should convict, the court then could resolve the defendant's legal objections without creating any danger that a second trial would be required. See *United States* v. *Wilson*, 420 U.S. 332. A defendant who insists on a pre-verdict resolution of his contentions prevents a final decision on guilt in a single trial, and it is not unfair to subject him to a second trial if the termination he obtained is improper.

Some of the Court's discussion in *Lee, supra,* slip op. 7, appears to assume that the critical question is whether the indictment was dismissed with prejudice. We believe that this passage, taken in context, should be understood simply as a reference to one character-

istic that differentiates true acquittals from other terminations. There is no logical basis for a rule that allows second trial after some dismissals but prohibits a second trial after others, even though the defendant has not been acquitted in either instance. The interests of a defendant in avoiding another trial are the same no matter what the reason for the termination of the first. In the present case, respondent would be exposed at a second trial to no greater expense or anxiety than Lee was, and the Court concluded that Lee's second trial was proper. The second trial is necessary here, as it was in *Lee,* to vindicate the interests of society in having the defendant's guilt or innocence resolved.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT FORBID A SECOND TRIAL WHEN THE FIRST HAS BEEN TERMINATED AT THE DEFENDANT'S REQUEST ON GROUNDS NOT AMOUNTING TO AN ACQUITTAL

A. THE DOUBLE JEOPARDY CLAUSE ERECTS AN ABSOLUTE BAR TO A SECOND PROSECUTION ONLY IF THE FIRST ENDS IN AN ACQUITTAL

Two competing principles dominate this Court's recent decisions concerning the constitutionality, under the Double Jeopardy Clause, of a second trial after the first has not ended in a finding of guilt by the factfinder. On the one hand, a second trial is impermissible if the first ends in an acquittal or its equivalent. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564.[6] On the other hand, when the first trial ends

[6] See also *Finch* v. *United States*, No. 76-1206, decided June 29, 1977 (decision that the statute alleged to have been violated is

at the defendant's request prior to a ruling on guilt or innocence, a second trial ordinarily may be held in order to vindicate the interests of society in having at least one decision on the defendant's guilt or innocence. See, *e.g.*, *Lee* v. *United States*, No. 76-5187, decided June 13, 1977; *United States* v. *Dinitz*, 424 U.S. 600.'

This case falls somewhere in between. It seems clear that the resolution of respondent's contention that pre-accusation delay violated the Due Process Clause did not amount to an "acquittal." The ruling did not represent "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*,

inapplicable to facts established by stipulation is unreviewable); *United States* v. *Jenkins*, 420 U.S. 358 (further factfinding proceedings barred after a bench trial ends in a decision that not all of the elements of the offense have been proved); *Fong Foo* v. *United States*, 369 U.S. 141 (retrial barred after district judge instructed the jury to return a mid-trial verdict of acquittal based on supposed prosecutorial misconduct and insubstantiality of prosecution evidence).

When the factfinder has made a finding of guilt, however, a subsequent acquittal may be set aside and the finding of guilt reinstated. *United States* v. *Morrison*, 429 U.S. 1; *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, *supra*, 420 U.S. at 365. See also *United States* v. *Rojas*, 554 F. 2d 938 (C.A. 9); *United States* v. *Allison*, 555 F. 2d 1385 (C.A. 7); *United States* v. *Calloway*, 562 F. 2d 615 (C.A.10); *United States* v. *Donahue*, 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs*, 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero*, 530 F. 2d 666 (C.A. 5); *United States* v. *DeGarces*, 518 F. 2d 1156 (C.A. 2); *United States* v. *Cahalane*, 560 F. 2d 601, 603 n. 2 (C.A.3).

' An exception is recognized for the extraordinary case in which the defendant requests a mistrial in response to judicial or prosecutorial "overreaching." See *United States* v. *Dinitz*, *supra*, 424 U.S. at 611.

supra, 430 U.S. at 571. See also *United States* v. *Sisson*, 399 U.S. 267, 290 n. 19. The district court's decision did not evaluate the weight of the evidence against respondent; to the contrary, the court denied respondent's motion for a judgment of acquittal, concluding that the evidence presented a question for the jury to decide (A. 19). The court did not address the general issue of guilt or innocence; it did not evaluate the elements of the offense or determine whether the proof had been addressed to those elements. It held, instead, that respondent was entitled to be discharged whether or not he had committed a crime.

The district court did not contemplate, however, that respondent would be reprosecuted; it dismissed the indictment with prejudice because it believed that the Constitution absolutely barred respondent's conviction. Although the district court's decision was palpably erroneous,[8] we cannot say, as the Court said in

[8] The delay between the commission of the offenses and the formal accusation was less than six months, a period that is not even long enough to justify judicial inquiry. Respondent asserted only the most general sort of prejudice—fading memory (A. 5, 8, 25). A contention of this sort is inadequate to establish an entitlement to relief. And the prosecutor offered a number of justifications for the delay, including the need to protect the identity of an informant, the desirability of pursuing additional leads in the investigation to discover respondent's confederates and source of supply, and the fact that no grand jury was sitting for two months (A. 11–12, 16, 26–27). The district court found that the "principal motive" of the delay was "to gather evidence of further crimes" by respondent (Pet. App. 8a). We are aware of no case holding or even suggesting that delay for this purpose is improper, let alone unconstitutional. *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, therefore establishes that the brief delay did not violate any of respondent's rights.

Lee, that "the order entered by the District Court was functionally indistinguishable from a declaration of [a] mistrial" (slip. op. 7; footnote omitted).

This Court therefore must decide whether a dismissal that is neither an acquittal nor the functional equivalent of a mistrial bars a second trial.[9] In order to illuminate the considerations that bear on that question, we first discuss the nature of the double jeopardy interests implicated by terminations of trials in advance of a decision on the general issue of guilt or innocence.

The prohibition against multiple trials for the same offense is based on the special interests protected by the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States*, 420 U.S. 377, 387–388. See also *Breed* v. *Jones*, 421 U.S. 519; *United States* v. *Jorn*, 400 U.S. 470, 479 (plurality opinion).

The special interests a criminal defendant has in the finality of a decision at trial that he did not commit the crime support the principle, which we have discussed above, that a true acquittal by the finder of facts is an absolute bar to a second trial. See *Forman* v. *United States*, 361 U.S. 416, 426. But these interests have never been thought to bar a second trial if the first trial does not end in an acquittal. When the first trial stops short of acquittal, whether a second trial may be held depends on a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

A rule that a second trial for the same offense invariably violates the Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy protection is aimed. • • • [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter*, *supra*, 336 U.S. at 688–689. As Mr. Justice Harlan explained for the plurality in *United States* v. *Jorn*, *supra*, 400 U.S. at 483–484, "it is clear beyond question that

[9] There is no question here concerning the right of the United States to appeal, so long as the Double Jeopardy Clause would not preclude the holding of a second trial. In enacting the Criminal Appeals Act, 18 U.S.C. 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, *supra*, 420 U.S. at 337; *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 568. Even under the view expressed by Mr. Justice Stevens, concurring in the judgment in *Martin Linen*, the court of appeals had jurisdiction of this case because the dismissal of the indictment was not an "acquittal." See 430 U.S. at 576 n. 1.

the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

There are three common situations in which a second trial may be held when the first does not end in an acquittal. The first is when a trial ends in a conviction that is set aside because of error. *United States* v. *Ball*, 163 U.S. 662; *United States* v. *Tateo*, 377 U.S. 463.[19] The second is when a trial ends at the defendant's request because of trial error or because of a defect in the institution of the proceedings. *Lee* v. *United States, supra; United States* v. *Dinitz, supra.* The third is when a trial has been terminated, even over the defendant's vigorous objection, because there is "manifest necessity" to do so or the "ends of public justice" so require. *Illinois* v. *Somerville*, 410 U.S. 458; *United States* v. *Perez*, 9 Wheat. 579.

In each of these situations the defendant is subjected to all the expense, anxiety, and risk of conviction that a second trial entails. All of these cases are governed by a single controlling principle: once a trial begins, the accused has a valued right, although not an absolute one, "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486 (plurality opinion). A second trial is permitted when it would not unjustifiably imperil this right. (1) When the defendant receives the verdict of the factfinder and is convicted, a second trial could not "deprive" him of the opportunity to receive that verdict. (2) A defendant whose trial is terminated before verdict at his own request is also not deprived of this valued opportunity; rather, he exercises control over the trial to choose an outcome he values more highly than a resolution of the general issue of his guilt or innocence. And (3) circumstances amounting to "manifest necessity" provide sufficient reason to deprive a defendant of the opportunity for a verdict even when he desires to receive the factfinder's decision. Although in all of these cases the defendant is tried more than once, retrial is necessary in order to have one fair adjudication of guilt or innocence. The public has a strong interest in obtaining such an adjudication, and the public's interest is sufficiently important to justify requiring defendants to stand trial twice.

Double jeopardy analysis balances against this public interest those of the defendant in obtaining a verdict if he wants one and retaining an acquittal if he gets one. Neither of those interests is, however, impli-

[19] This rule is thoroughly discussed in our brief in *Burks* v. *United States*, No. 76-6528, argued November 28, 1977. We have furnished counsel for respondent with a copy of that brief.

cated here. Respondent sought and received a dismissal for reasons unrelated to his guilt or innocence. In doing so he did not receive an acquittal, nor was he deprived of the opportunity to do so. Respondent may be tried a second time if, as we contend, he was not entitled to the dismissal he sought and received.[11]

B. RESPONDENT'S MOTION TO DISMISS THE INDICTMENT REMOVED ANY BAR TO A SECOND TRIAL

1. In the absence of judicial or prosecutorial overreaching, a motion to terminate the trial before a verdict on the general issue removes any double jeopardy objection to a second trial

"'[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.'" *United States* v. *Dinitz, supra,* 424 U.S. at 607. This is so because the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error" (*id.* at 609; footnote omitted). If the defendant, for reasons he deems sufficient, exercises that control by asking to terminate the proceedings prior to any resolution of the general issue of

[11] Of course, if the district court's ruling on the issue of pre-indictment delay were correct, the government's appeal would fail on the merits, and petitioner would be immune from reprosecution under principles of *res judicata.*

guilt or innocence, the Double Jeopardy Clause does not prohibit the holding of a second trial. This principle applies, moreover, whether the defendant seeks a mistrial or an order dismissing the indictment. *Lee* v. *United States, supra.*

Lee controls this case. In *Lee* the defendant was charged with theft, and he moved after the beginning of his trial (but before the attachment of jeopardy) to dismiss the information because of a drafting error. The district court took the motion under advisement until it could study the matter, and it proceeded to hear evidence. After all of the evidence had been heard, the court dismissed the information because of the defect. This Court held that the Double Jeopardy Clause did not bar a second trial on a corrected charge, because the information had been dismissed on Lee's own motion and the dismissal did not resolve the general issue of guilt or innocence.

Here, as in *Lee,* the defendant desired to avoid a resolution of the general issue, and in accordance with his wishes there was no decision on the merits. The only obstacle to conviction was a purported flaw in the institution of the proceedings. The "proceedings were terminated at the defendant's request and with his consent" (*Lee, supra,* slip op. 10). "Counsel for [respondent] made no effort to withdraw the motion" pending a return of a verdict (*ibid.*). "And counsel offered no objection when the court * * * decided to terminate the proceedings without having entered any formal finding on the general issue" (*ibid.*). It fol-

lows that here, as in *Lee*, the Double Jeopardy Clause does not bar a second trial.[12]

There is, however, language in *Lee* that might be thought to look in the contrary direction. The Court stated (slip op. 7) that "[t]he critical question is whether the order [terminating the trial] contemplates an end to all prosecution of the defendant for the offense charged. * * * Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, * * * [a] further prosecution is barred by the Double Jeopardy Clause." In the present case the district court's order contemplated an end to prosecution, and it was granted on the ground that respondent "simply cannot be convicted of the offense charged." We submit, however, that this portion of the Court's discussion in *Lee* did not pertain to a case such as the present one.

The first, and most obvious, distinction is that *Lee* involved the institution of a new criminal proceeding following the termination of the first trial. Had Lee's

[12] *Lee* also establishes that it does not matter whether the court dismisses an indictment after hearing evidence, so long as the dismissal does not resolve the general issue of guilt or innocence. In *Lee* itself the court heard all of the evidence before dismissing the indictment. The court of appeals' statement (Pet. App. 2a) that the Double Jeopardy Clause uniformly bars a second trial when the dismissal is "based upon facts established by evidence received at trial" is the precise position rejected by this Court in sustaining the government's right to appeal in *United States* v. *Wilson*, 420 U.S. 332. Compare *id.* at 345 with 492 F. 2d 1345, 1347–1348 (C.A. 3). Cf. *United States* v. *Sanford*, 429 U.S. 14 (second trial permissible even though the indictment had been dismissed after trial on the basis of evidence received at trial; see 503 F. 2d 291, 293 (C.A. 9)).

first trial terminated on the ground that he "simply [could not] be convicted of the offense charged," ordinary principles of *res judicata*, embodied in the Double Jeopardy Clause, would have barred the institution of new proceedings against him involving the same offense.[13] The dismissal in *Lee* was without prejudice to a possible further attempt to convict him, however, and a second trial therefore was permitted by *res judicata* principles.

The charges against respondent were dismissed with prejudice because the district court concluded that he could not be convicted of the offense charged, and, as the language in *Lee* indicates, a new proceeding involving the same offense would have been barred by double jeopardy if the district court's disposition had been permitted to become final. But the appeal that the government has pursued here prevented the district court's decision from becoming final. It therefore has no *res judicata* effect, and there is no double jeopardy barrier to the appeal under the language in *Lee*.

In addition, it seems plain that the Court was referring at page 7 of the *Lee* opinion only to dismissals that resolved the general issue of guilt or innocence (*i.e.*, to acquittals). The Court was discussing *United States* v. *Jenkins*, 420 U.S. 358, a case that involved a

[13] *United States* v. *Oppenheimer*, 242 U.S. 85, could be read as suggesting that the Double Jeopardy Clause does not require the application of the doctrine of *res judicata* to criminal cases, since the principle was applied there without acknowledgment of any constitutional compulsion to do so. We seriously doubt, however, that the Clause would permit statutory or judicial abolition of *res judicata* principles in criminal cases. See *Ashe* v. *Swenson*, 397 U.S. 436.

resolution of the general issue, and it stated that its discussion was a refinement of *Jenkins*. The Court applied the *Lee* discussion in *Finch* v. *United States*, No. 76–1206, decided June 29, 1977, another bench trial in which the district judge resolved the general issue in favor of the defendant. *Jenkins*, *Finch*, and the discussion in *Lee* are examples of the principle that a true acquittal of the defendant is final, unless there also has been a finding of guilt that can be reinstated.

Acquittals always have occupied a special place in our double jeopardy jurisprudence, and they have been governed by unique rules. See *United States* v. *Martin Linen Supply Co.*, *supra*. To the extent it is applicable at all to cases involving appeals, the discussion in *Lee* should, we submit, be understood as an explanation of one of the critical differences between unreviewable acquittals and other kinds of rulings that terminate a trial.

There is no reason for an inflexible rule that would prohibit a second trial even though the defendant had not been acquitted. The interests of a defendant in avoiding a second trial are the same no matter what the reason for the termination of the first short of an acquittal. Respondent would be exposed, at a second trial, to no greater expense or anxiety than Lee was, yet this Court concluded that Lee's second trial was proper. If the district court's dismissal was erroneous, a second trial is necessary here, as it was necessary in *Lee*, to permit the *first* decision on the defendant's guilt or innocence.

The first trial of respondent did not end because of prosecutorial or judicial overreaching; it ended, as in

Lee, with a favorable judicial response to a motion the defendant himself had made. As in *Lee*, the defendant could have avoided the mid-trial termination, and obtained the verdict of the jury, simply by asking the Court to postpone a final ruling on his claim of impermissible delay. If there is any meaningful difference between this case and *Lee*, it is that the error requiring a second trial in *Lee* was made by the prosecutor, who drafted a defective information; here the only error was made by the district court in granting respondent's motion to dismiss the indictment.[14] It would be a perverse rule that rewarded defendants with immunity from further prosecution when they lead district judges into error, while subjecting to a second trial defendants, such as Lee, whose first trial was infected with an error of the prosecutor's making that made dismissal appropriate. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry respondent on what has always been a sufficient charge.

To put the matter slightly differently, we perceive two sorts of arguments that might be advanced by a defendant in a case such as the present one. The first argument is that the defendant has an indefeasible interest in retaining a favorable judgment, simply because it was favorable. But this Court held in

[14] If the dismissal was correct, the Double Jeopardy Clause would not bar the government's appeal either, since the appeal would simply result in an affirmance, and no second trial of respondent would ensue.

United States v. *Wilson*, 420 U.S. 332, that a defendant has no vested interest in retaining the benefits of legal errors. "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law" unless he would be subjected to a second trial and that trial would violate the Clause (420 U.S. at 345).

The pertinent interest, then, is in avoiding a second trial, not in preserving a favorable decision. This is the second argument. But *Lee* held that a defendant who seeks a mid-trial dismissal of the indictment may be tried a second time. *Wilson* and *Lee*, taken together, thus demonstrate that none of respondent's interests would be offended by further proceedings in this case.[15]

[15] The Court explained in *Wilson*, *supra*, 420 U.S. at 352 (footnote omitted), that a second trial is objectionable in part because it "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses of his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." In the present case, however, there was no verdict of acquittal, and the prosecutor did not "fail" with the first fact-finder. Although it is conceivable that the prosecutor might strengthen his case at a second trial, this is always a possibility when a second trial is held. Yet, as *Lee* and *Dinitz* establish, second trials are permissible after a defendant has exercised his option to end a trial prior to verdict. Although the second trial may be costly to the defendant, he had the option to press on to verdict in the first trial and, for reasons satisfactory to himself, decided not to do so.

We submit, in sum, that when a defendant seeks and obtains a mid-trial dismissal for reasons that do not amount to an acquittal, he may be tried a second time if he led the district court into error, even though the error is one that, if not corrected on appeal, would bar further prosecution.[16] The defendant's desire to avoid even one ruling on guilt or innocence, and the costs to him of a second trial, must be subordinated to "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, *supra*, 336 U.S. at 689. The public has an interest in exposing defendants to at least one decision on guilt, and defendants should not be permitted to defeat that interest by injecting error into a trial, halting it short of verdict, and then complaining that exposure to another trial would be costly to themselves. The cost is of their own making.

2. A defendant may safeguard his legitimate interests by going to verdict and saving his objections for post-verdict resolution

One objection to our submission might be that it is unfair to require a defendant to submit to the risk of two trials as the cost of obtaining resolution of his trial motions. This objection would be unfounded.

[16] Our argument is supported by the principle that the district court's characterization of its ruling is not dispositive. See, e.g., *United States* v. *Jorn*, *supra*, 400 U.S. at 478 n. 7; *United States* v. *Sisson*, *supra*, 399 U.S. at 270, 286–287. To give conclusive force to the judge's subjective intention to dismiss an indictment with prejudice would be, in effect, to give conclusive force to the judge's description of his own decision. The interests of the defendant in avoiding a second trial are not affected by the judge's subjective intentions with respect to reprosecution, and it would be pointless to let those intentions become self-fulfilling prophesies.

The rule we espouse—that a defendant who obtains a pre-verdict termination of his first trial may not block a retrial on double jeopardy grounds—does not impair the defendant's "valued right" to obtain a verdict at the first trial, does not impair the finality of any verdict he obtains, and does not subject him to pressure of any sort. Far from it; a defendant who desires to obtain the jury's verdict may do so simply by asking the judge to postpone his legal ruling until after verdict, thereby receiving an acquittal by the factfinder if one should be forthcoming."

This strategy will safeguard all of the defendant's interests. If he should be found guilty, he would be entitled to a post-verdict ruling on his claim of legal error—in the present case, by a motion for arrest of judgment pursuant to Fed. R. Crim. P. 34. If the district court should agree with his assertion of error, it would set aside the verdict. The prosecution then could appeal, and the legal issues could be resolved without risk of a second trial. *United States* v. *Wilson*, 420 U.S. 332. If the court should reject the claim of error, the defendant could appeal and obtain a definitive resolution. No matter what the jury and the district court do, the defendant would be exposed to but a single trial.

Saving legal issues for post-verdict decision preserves the accused's right to receive an acquittal by

[17] Submitting the case to the jury would have been almost costless to respondent. All the evidence already had been received, and Count III was submitted to the jury. Submitting Count I as well would not have added to the expense or travail of trial.

the factfinder at a single trial; it also minimizes his exposure to multiple trials by eliminating any significant chance that a retrial might be required by an erroneous mid-trial termination. If, disdaining the opportunity to receive the verdict of the factfinder, the accused seeks and receives a mid-trial termination, it is not unfair to hold a second trial if the termination was improper, or if the error leading to the termination can be corrected.

Indeed, we believe that the district court lacked authority to make a mid-trial ruling on respondent's assertion of unconstitutional pre-accusation delay. Respondent moved prior to trial to dismiss the indictment. Although the district court should have denied the motion out of hand in light of the very brief period of delay involved, it was in any event correct in not granting the motion prior to trial, because the success of such a motion depends on the defendant's ability to demonstrate significant prejudice from the delay—a matter that can ordinarily be evaluated only after the evidence has been heard at trial. See *United States* v. *Marion*, 404 U.S. 307, 326.[18]

Having deferred a final decision on the motion, however, the court lacked authority to grant respondent's motion in mid-trial, regardless of its merit, because Fed. R. Crim. P. 12(e) provides that a motion

[18] We argued at pages 40–48 of our brief in *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, that deferral is the better course. We furnished a copy of that brief to counsel for respondent at the time our petition was filed.

made before trial "shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, *but no such determination shall be deferred if a party's right to appeal is adversely affected*" (emphasis supplied). Most motions to dismiss because of pre-accusation delay are not readily susceptible of pre-trial determination, and thus there usually is "good cause" for deferral, but under Rule 12(e) the court should have deferred decision until after verdict if there was any doubt about the government's right to appeal from a mid-trial ruling.

Rule 12(e) was designed in major part to protect the government's right to appeal, conferred by 18 U.S.C. 3731, against mid-trial decisions that might create double jeopardy bars to further proceedings. The Advisory Committee's proposed Rule 12(e) would have allowed mid-trial decisions without limit. Congress modified the proposal because it "believe[d] that the rule proposed by the Supreme Court could deprive the government of its appeal rights" (see H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 8 (1975)).[10]

We have argued above that the mid-trial decision on respondent's motion did not create a double jeopardy bar to a further trial. But this difficult question could have been eliminated by postponement of the district court's decision. Respondent contends that the mid-trial decision obliterated the United States' right

[10] The amended Rule 12(e) became effective December 1, 1975, the first day of respondent's trial.

to appeal; if he is even arguably correct, the court should not have decided his motion in mid-trial. This is not a case like *United States* v. *Martin Linen Supply Co., supra,* in which the district court rendered a decision explicitly authorized by the applicable rules." Here, to the contrary, given the rule in the Sixth Circuit that pre-verdict dismissals are not appealable (Pet. App. 2a-3a), the district court was required by the rules not to act as and when it did. Respondent, who induced the court to grant his motion without submitting the case to the jury, cannot seek to profit from the error he brought about."

Respondent gambled that his legal theory was correct. He sought and received a decision on that theory before receiving a decision on the general issue of guilt or innocence. Should the court of appeals agree with respondents' argument that he was subjected to unconstitutional pre-accusation delay, it would affirm the judgment, and respondent would not be exposed to another trial. But if, as we contend, the district court erred—once in ruling on the motion before ver-

[9] See 430 U.S. at 573-575. *Martin Linen* also presents a special situation because it involved an acquital. See pages 9-10, 19-20, *supra*.

[11] A rule barring retrial after an erroneous dismissal of the indictment with prejudice would disserve "the purpose of law to protect society from those guilty of crimes" (*Wade* v. *Hunter*, *supra*, 336 U.S. at 689) without securing to defendants any advantage that they could not obtain equally well by waiting until after verdict to press arguments such as pre-accusation delay. Permitting retrial doubtless would encourage defendants to save some arguments to be raised after verdict, but there is no reason not to do so especially when doing so would avoid second trials and serve the important societal interest to which this Court referred in *Wade*.

dict, and again in granting it—respondent should be tired once more in order to vindicate the interest of society in obtaining one adjudication of his guilt or innocence. Respondent's ability to persuade the district court to err in his favor, and to pretermit resolution of his guilt or innocence, should not create a constitutional bar to reprosecution.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions that the court of appeals decide the appeal on its merits.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
FREDERICK EISENBUD,
Attorneys.

DECEMBER 1977.

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* The Solicitor General is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN ARTHUR SCOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM C. MARIETTI
820 Terrace at Clay
Muskegon, Michigan 49440

ALEXIS J. ROGOSKI
704 Hackley Bank Building
Muskegon, Michigan 49440

Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINIONS BELOW

Petitioner has cited the relevant opinions in its brief and accompanying appendix.

QUESTION PRESENTED

Does the Fifth Amendment prohibit the United States from subjecting the Respondent to a second trial when the judge, at the conclusion of all the proofs in the first trial by jury, dismissed the indictment with prejudice?

CONSTITUTIONAL SECTION, STATUTE AND RULE INVOLVED

The petitioner has cited the relevant sections of the Constitution, United States Code and Federal Rules of Criminal Procedure.

STATEMENT

Respondent accepts the petitioner's statement subject to the following modifications. After the government had submitted its proofs and rested, the respondent renewed his motion to dismiss Counts I and II due to the pre-accusation delay occasioned by the government. The judge denied the motion at that stage for the reason that he needed to hear more evidence, and the trial proceeded until both sides had concluded their proofs.

The petitioner's characterization of the respondent's theory is inaccurate. The respondent presented ample evidence to establish that the informant's motive for testifying was to prevent respondent from testifying against the informant in a charge pending against him.

At the conclusion of all of the proofs from both parties, the judge dismissed Counts I and II with prejudice, reserving Count III for the jury which acquitted respondent.

SUMMARY OF ARGUMENT

The ultimate issue to resolve in this case is whether or not the Double Jeopardy Clause precludes the appellate courts from reviewing the dismissal of Count I of the indictment. At the stage in the lower court proceedings where Count I was dismissed, jeopardy had attached. The trial by jury had commenced and both sides had completed submission of their proofs through several days of testimony and exhibits. *Downum v. United States*, 372 U.S. 734.

Given the fact that jeopardy had attached, an appeal by the government, absent a showing of an exception to the Double Jeopardy Clause, would be barred. One of the commonly recognized exceptions is the situation of a mistrial that is declared due to manifest necessity. *Illinois v. Somerville*, 410 U.S. 458. Clearly, this case did not involve a mistrial. Nor was this a situation where there was a verdict of guilt rendered which could simply be reinstated should the government prevail on appeal. Rather, the order dismissing Count I with prejudice was a final decision favorable to the defendant that he could not, under any circumstances, be convicted of the crime charged.

The fact that the respondent moved and requested the final order of the court does not waive his constitutional right to be free from being placed in double jeopardy. To hold otherwise would ignore the fact that the focus of concern in the area of double jeopardy is to preclude multiple trials. *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L.Ed2d 642, 97 S.Ct. ____. Furthermore, in this case, the respondent did not deliberately defer his request for dismissal until after

jeopardy attached in order to frustrate any attempt at appeal by the government. The defendant moved for dismissal prior to commencement of the trial and it was the decision of the judge to deny the motion without prejudice until after the evidence had been presented from both sides. The judge did not simply reserve decision on the motion until after trial. Rather, the motion failed and was denied without prejudice. It was only after the respondent had been subjected to a lengthy trial, that the judge reversed his earlier ruling and dismissed Count I of the indictment.

The most recent decisions of this court considering the applicability of the Double Jeopardy Clause govern the existing situation. The judge granted the dismissal on the ground that the respondent could not, under any circumstances, be convicted of the crime charged. Thus, the order contemplated an end to all prosecution and did not involve a mistake by the government that could be corrected. *See, Lee v. United States*, ____ U.S. ____, 53 L.Ed.2d 80, 97 S.Ct. ____. The nature of a finding that due process was denied because of pre-indictment delay precludes a restoration of that due process on a retrial. The basis for such a ruling involved a finding that the respondent was prejudiced by loss of memory. How can that loss possibly be restored prior to a second trial? To the contrary, as more time elapses, the memory deteriorates further and the original error is magnified.

The fact that the trial judge did not make a finding of guilt or innocence is not a critical factor. Certainly, had there been a finding of guilt, the appeal would be permitted as in *United States v. Wilson*, 420 U.S. 332. However, where as here, there was no such formal finding, a successful government appeal would result in

retrial as opposed to mere reinstatement of a verdict. Under these circumstances, the Double Jeopardy Clause deprives the appellate courts of jurisdiction to review the lower court decision. *Finch v. United States*, ____ U.S. ____, 53 L.Ed2d 1048, 97 S.Ct. ____.

This conclusion is not altered by Federal Rule of Criminal Procedure 12(e). The order denying the motion to dismiss was entered before Rule 12(e) became effective. The judge did not defer decision on the motion until trial, but, rather, denied it due to a failure of proof. The decision to hear the motion was made by the court after it refused to reconsider its decision until all evidence had been presented. The respondent had acted diligently and properly in attempting to obtain a pre-jeopardy motion. Any alleged error by the court in regard to Rule 12(e) does not render the Double Jeopardy Clause inapplicable. Such an error cannot be considered unless there is jurisdiction for review. The Double Jeopardy Clause bars any such review because the trial court rendered a final decision at the conclusion of the presentation of all evidence that the respondent could not be convicted of the offense charge.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE BARS AN APPEAL BY THE GOVERNMENT OF A DECISION BY THE TRIAL JUDGE RENDERED AFTER ALL PROOFS ARE SUBMITTED THAT THE DEFENDANT CANNOT BE CONVICTED OF THE OFFENSE CHARGED, WHERE, IF SUCCESSFUL, THE APPEAL WOULD RESULT IN A SECOND TRIAL.

A. The protection of the Double Jeopardy Clause extends beyond mere acquittals to include any final decision in a defendant's favor that he cannot be convicted of the crime charged.

The Government has invoked the jurisdiction of the Sixth Circuit under the purported authority of 18 U.S.C. §3731, which provides as follows:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

While historically the Government's right to appeal a decision in a criminal case has been limited by statutory provisions, respondent acknowledges that the only relevant existing limitation is the Double Jeopardy Clause of the Fifth Amendment to the Constitution. *United States v. Wilson*, 420 U.S. 332. Thus, an examination of the Double Jeopardy Clause as interpreted by this Court is essential to a disposition of this case.

It is clear that acquittals are not appealable by the government. The fundamental principal of double jeopardy is that "[A] verdict of acquittal could not be received, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States v. Ball*, 163 U.S. 662.[1]

The petitioner contends that the dismissal appealed from in this case was not an acquittal and, thus, is not subject to the restraint of the Double Jeopardy Clause. While respondent acknowledges that the label attached to the action of the trial judge was a dismissal with prejudice rather than "acquittal", the terminology is not decisive. *See, United States v. Sisson*, 399 U.S. 267. The petitioner would analogize the instant case to a line of decisions culminating with *Illinois v. Somerville*, 410 U.S. 458. In that case a jury was empanelled to hear the case. At that point, the attorney for the government moved for a mistrial after discovering that the indictment was defective.

The district judge granted the requested relief over the defendant's objection. The Court in *Somerville* held that a new trial would not violate the Double Jeopardy Clause since the district court actually lacked jurisdiction to hear the case and reversal on appeal would have been a certainty had the defendant been convicted. Under these circumstances, manifest necessity and the ends of public justice would be served by a new trial. The government in the instant case suggests that this reasoning opens the door for appeal since the ends of public justice so require.

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[1] This axiom is any acquittal whether by jury, judge, or on post verdict motion. *United States v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L.Ed2d 642, 97 S.Ct. ____.

However, respondent submits that this case is distinguishable from *Somerville* in significant particulars.

The district court herein had jurisdiction pursuant to a valid indictment that sufficiently charged a criminal offense under the laws of the United States contrary to the *Somerville* situation. Furthermore, and most importantly, the decision in this case was a final ruling favorable to the respondent. Counts I and II were dismissed by the Court at the conclusion of the evidence and the jury returned a not guilty verdict as to Count III. In *Somerville* there was no ruling favorable to the defendant as here. The trial was merely terminated without an order or judgment favorable to the petitioner. The significance of this distinction was noted by Justice Renquist in the majority opinion of *United States v. Jenkins*, when he stated, "We disagree with this analysis [analogizing *Jenkins* to *Somerville*] because we think it is of *critical importance* whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. 358 at 365, n.7 (emphasis supplied[2] Thus, the reasons underlying retrial after a mistrial are not relevant to a situation such as the instant case, where the trial terminates in the defendant's favor.

Another factor distinguishing the *Somerville* line of cases is the fact that, although jeopardy attached, there had been no trial. This mistrial was declared in *Somerville* prior to the introduction of any evidence. This factor is

[2] This Court has recently reaffirmed this reasoning by permitting appeal of the dismissal of a defective indictment. *Lee v. United States*, ____ U.S. ____, 53 L.Ed2d 80, 97 S.Ct. ____.

significant when the reasons for the constitutional prohibition against double jeopardy are considered.

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . The underlying idea, one that is deeply ingrained in at least, the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88

In the instant case, all of the evidence on behalf of the prosecution and the defense had been presented before the trial was terminated in appellee's favor. This presents the optimum situation for the government to review its mistakes and take a second chance at convicting the defendant – a chance the double jeopardy clause does not permit. See, *United States v. Wilson*, 420 U.S. 332. Thus, the *Somerville* court would deny a retrial even in a mistrial situation if the impetus for discharging the jury is bad faith conduct by the judge or prosecutor since that is tantamount to harassment of the defendant by successive prosecutions which afford the government a more favorable opportunity to convict the defendant after carefully examining the previous record for tactical errors.

As more recent Supreme Court decisions reflect, the concern expressed in *Green* and *Somerville* is the controlling factor in assessing the applicability of a bar to

further proceedings under the Double Jeopardy Clause. In *United States v. Sisson*, 399 U.S. 267, the petitioner had presented three pretrial motions to dismiss in the district court, all of which were denied. The case proceeded through trial and the jury returned a verdict of guilty. The defendant made a post-verdict motion for arrest of judgment. The court granted the motion, however, the opinion cited grounds contained in the pretrial motion and dismissed the indictment. While the court was concerned with the application of the now repealed Criminal Appeals Act, the opinion discussed the constitutional implications of a new trial. A protracted discussion of the legislative history of the Act concluded that Congress has shown concern for the plight of defendants exposed to added expense and anxiety together with the possibility of multiple trials in the event of a successful appeal by the United States. The Court rejected the notion that the applicability would depend upon the label the district court attached to its order, e.g. dismissal or acquittal. Rather, a reviewing court must examine the basis for the decision in the lower court in order to determine whether the action was in fact an acquittal. *United States v. Sisson, supra* at 279, n.7

The test developed by the *Sisson* court was that the dismissal or arrest of judgment must not be based on any matters not apparent on the face of the indictment itself. The issue raised by the defense must be capable of determination without trial of the general issue and the trial of the facts surrounding the commission of the offense must be of no assistance in determining the validity of the defense. *United States v. Covington*, 395 U.S. 57. If those circumstances exist, the double jeopardy clause would not bar a retrial after government appeal.

However, if the lower court relied upon facts established at trial to support his decision to dismiss or acquit, the order will bar an appeal by the government. The Court concluded in *Sisson* that the action of the lower court was an acquittal since the judge considered matters not contained in the indictment itself but developed at trial. The district judge went beyond the face of the record relying on evidence introduced at trial including observation of the demeanor of the petitioner. In fact, the trial judge could not have arrived at his decision without hearing the facts of the case.

The *Sisson* opinion distinguished those facts from *United States v. Covington*. The Court had permitted appeal in *Covington*. However, that case involved a dismissal before trial without submission of facts to a jury or any evidentiary hearing. In *Sisson*, the court's dismissal followed presentation of evidence to the jury. As a result, the decision was not subject to appellate review.

Respondent submits that the facts in the instant case are analagous to those of *Sisson*. Respondent presented his motion to dismiss for preindictment delay before trial, at the conclusion of the government's case in chief and at the conclusion of all of the proofs. The pretrial denial of the motions was made without prejudice since the court wanted to consider facts developed during the trial. That the district judge wanted to hear the evidence in the case to assist in deciding whether to dismiss or acquit the respondent is clear from the pretrial order which denies the motion without prejudice "so that the defendant may reassert it if he chooses after all evidence has been presented." (A. 15) The trial court considered evidence brought out in the trial concerning the nature of

respondent's work, the circumstances surrounding his assignment to Central Narcotics, the demeanor of the witnesses, his impairment of recall and based his decision "solely out of the peculiar circumstances of this case." (Pet. App. D). Based on the principles enunciated in *Sisson*, respondent contends that the action of the court was tantamount to an acquittal and involved a final determination in defendant's favor for purposes of analysis of the applicability of the Double Jeopardy Clause.

Furthermore, the respondent submits that it is not necessary that the trial court's decision be considered an acquittal in order to invoke the Double Jeopardy Clause.

The petitioner argues that only acquittals are inviolably preserved by the Fifth Amendment. This court has recently rejected that notion. *Finch v. United States*, *supra*. In Finch, after hearing the evidence, the trial judge dismissed the information for failure to state an offense. The dismissal was granted prior to the declaration of guilt or innocence. In that sense, there was no acquittal. However, this court, citing *United States v. Jenkins*, 420 U.S. 358, held that the Circuit Court of Appeals was without jurisdiction to hear the appeal. *Id.* Thus, it is clear that a decision by the court following presentation of all the evidence will bar an appeal despite the fact that the ruling is not an acquittal.

Finch also cited the court's most recent decision concerning double jeopardy. *Lee v. United States*, *supra*. The language in *Lee* is directly applicable to the instant situation. While the holding essentially refused to apply the Double Jeopardy Clause to prevent a trial, there are significant variances between the facts in *Lee* and this case. First, the points of similarity should be noted.

There was no general finding of guilt or innocence in *Lee* as in this case. *Lee v. United States*, *supra*, at n.4. Also, the decision of the trial court in each case was rendered after all of the evidence from both sides had been presented.[3] At this juncture, the fact patterns in the two cases diverge.

The *Lee* opinion proceeded from the premise that the lower court's action should be considered a declaration of a mistrial when it ruled that the information was defective. *Lee v. United States*, *supra*, 53 L.Ed2d at 86. Clearly, the action of the judge in the instant case was not a declaration of mistrial. Nothing occurred during the course of the trial that required a dismissal nor was the fatal error of the government something that could be corrected on retrial as the defective information in *Lee* was. Rather, the reason for dismissal of Count I was due to the activities of the government that took place *before* trial. Furthermore, that error resulted in prejudice to the respondent because of total lack of recall which, obviously, could never be restored no matter how many retrials were permitted.

Consequently, the decision by the lower court herein was functionally distinguishable from a mistrial. *Cf. Lee v. United States*, *supra*. This case more closely resembles the situation in *United States v. Jenkins*, *supra*, which also did not involve an acquittal. However, the lower court terminated the trial in the defendant's favor prior to a verdict which could have resulted in conviction or acquittal. That case was tried to the court, and, after hearing all the evidence, the judge dismissed the

[3] A jury having been empanelled, jeopardy had attached, *Downum v. United States*, 372 U.S. 734.

indictment which effectively granted a motion that had been filed prior to the commencement of trial. The dismissal was based on an interpretation of the relevant law. However, the Court, in review, was uncertain whether the dismissal necessarily involved a finding of facts which would have resulted in a guilty verdict had the government's proposed interpretation of the law been applied. As a consequence, the opinion noted that a retrial would be necessary should the government prevail on appeal. *United States v. Jenkins, supra,* 420 U.S. at 370.

That factor was significant in view of the Court's decision in the companion case, *United States v. Wilson, supra.* In *Wilson*, defendant had presented a pretrial motion to dismiss for preindictment delay which paralleled respondent's motion at issue in this case. A pretrial hearing was held establishing prejudice occasioned by the loss of a key witness during the delay. However, the trial court denied the motion and ordered the case to trial. After presentation of all evidence, the jury returned a verdict of guilty. The petitioner presented several post-trial motions. Without ruling on these motions, the trial judge overruled the jury and dismissed the indictment due to the delay previously raised in the defendant's pretrial motion. The opinion did not find it necessary to determine whether the trial judge's action was an acquittal under the reasoning of *Sisson. Id.* at 336. Rather, the Court concluded that the appropriate focus should be on the Double Jeopardy Clause's prohibition of multiple trials. The Court stated:

> "The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial."

United States v. Wilson, supra at 342.

Therefore, the Court concluded the constitutional protection of the Double Jeopardy Clause against government appeal attaches only where there is a danger of subjecting the defendant to a second trial for the same offense.[4] The Court ruled that with the amendment of 18 U.S.C. §3731, the only limitation on government appeal is the Double Jeopardy Clause. *Id.* at 339. The opinion went on to note that "[W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended" and "[s]ince reversal on appeal would merely reinstate the jury's verdict (in *Wilson*) review of such an order does not offend the policy against multiple prosecutions." *Id.* at 344-45. The jury had already found the petitioner guilty and a reversal on appeal would merely mean the jury verdict would be allowed to stand. The Court noted that:

> "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law *when that error could be corrected without subjecting him to a second trial before a second trier of fact.*" (emphasis supplied)

Id.

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[4] The opinion refused to overturn the *Sisson* decision barring appellate review, although the defendant had been found guilty by a jury, because *Sisson* was nonreviewable primarily for statutory, as opposed to constitutional reasons, not relevant in the *Wilson* case.

The *Jenkins* decision pointed to this reasoning as the primary principle of *Wilson* in observing:

> "We hold today in *Wilson, supra*, that the Double Jeopardy Clause does not bar an appeal when an error of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt. But because of the uncertainty as to the basis for the District Court's action here, *Wilson* does not govern this case."

United States v. Jenkins, supra, 420 U.S. at 368.

The uncertainty, noted previously in this brief, refers to the lack of a finding of actual guilt under the law proposed by the government. The trial proceedings in *Jenkins* did not result in either a verdict or finding of guilt. However, the opinion considered it of critical significance that the lower court proceedings had resulted in a decision favorable to the petitioner:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not a resolution of the factual issues against the Government" . . . "But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. §3731 [18 USCS §3731] that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and removal. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in the defendant's favor."

Id. at 369-70.

As with *Jenkins*, the facts herein are distinguishable from *Wilson*. In this case the respondent was not found guilty at the trial level. On the contrary, a full trial of all issues bearing on the elements of the offense was conducted after the jury had been empanelled. Unlike the facts in *Serfass v. United States*, 420 U.S. 377, jeopardy had attached. At the conclusion of the trial, a final decision in favor of the respondent was rendered by the dismissal of Counts I and II by the Court and Count III by the jury. These are precisely the circumstances alluded to in *Jenkins*. If the government were permitted to appeal, a reversal would result in a plenary retrial of issues raised in the respondent's previous trial where all of the issues bearing on the elements of the offense were completely litigated and considered by the court in ordering the dismissal of Counts I and II. Unlike *Wilson*, there is no contrary verdict to reinstate. The judge and the jury have effectively acquitted the respondent and the only way the government can prevail in this case is via a retrial which is barred by the Double Jeopardy Clause.

The basis for respondent's contention that these facts are distinguishable from a mistrial, is found in the court's discussion of *Jenkins* set forth in *Lee*. Petitioner incorrectly assumes that this court analyzed *Jenkins* on the premise that it involved an acquittal. (Br. 19). This assumption is invalid in view of the court's statement in *Lee* that it did not consider when rendering the opinion whether the facts in *Jenkins* amounted to an acquittal. *Lee v. United States, supra*, 53 L.Ed2d at 87, n.8. As stated in *Lee* "[T]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Id.*

Applying that test to the instant case, it is clear that the trial on Count I terminated in the respondent's favor. When the judge ruled on the motion to dismiss at the conclusion of the proofs, he did so on the basis of the intentional nature of the delay coupled with prejudice to the respondent. That prejudice related to his inability to recall the events on the date of the offense charged in Count I due to the peculiar nature of the respondent's work. The court also noted the unsatisfactory nature of the evidence against the defendant due to the inability of the informant who testified for the government to recall events. With this basis for dismissal, clearly the trial court contemplated an end to further prosecution. Loss of memory, unlike indictments when defective, cannot be restored or repaired.[5] Consequently, not only is it impossible to correct the error in a second trial, it is certain that the error would be magnified. With this in mind, the order dismissing Count I concluded in respondent's favor on the basis that he could never be prosecuted or convicted for an offense charged. The petitioner acknowledges that fact. (Br. 11, 18)

[5] In fact, as time passes, the degree of prejudice is increased as memory continues to fade. This unique characteristic of errors due to pre-accusation delay was noted by an Eighth Circuit opinion which stated:

> "The remand would provide the government with another chance to convict the appellees by exhaustingly reviewing the record, marshalling the facts and rearguing the case in a manner not previously presented . . . The appellees would be put to further expense, ordeal and anxiety . . . Even if the trial judge were available on remand, there is nothing to *insure that the resultant dimming of the memory will not adversely affect the rights of the appellee.*" *United States v. Jaramillo*, 510 F.2d 808 (8th Cir. 1975)

This situation is precisely what the court referred to in *Lee*. The respondent relies on the specific language in the opinion which states:

> "Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause."

Lee v. United States, supra, 53 L.Ed2d at 87[6]

This portion of the *Lee* opinion is dispositive of the appeal in this case and clearly establishes the applicability of the Double Jeopardy Clause to preclude a second trial.

B. Respondent's Motion to Dismiss the Indictment Did Not Bar Subsequent Objection to Being Twice Placed in Jeopardy for the Same Offense.

1. A Motion to dismiss made during trial, after having been denied without prejudice prior to commencement of trial, does not deprive the respondent of the protection of the Double Jeopardy Clause.

The petitioner relies on *Lee* for the proposition that the motion to dismiss made by respondent at trial prevents him from claiming double jeopardy in a second trial. (Br. 17) The opinion in *Lee* referred to *United States v. Dinitz* as holding that retrial is permissible when

[6] Petitioner suggests that it would be unjust and perverse to let the judge's error in the lower court go uncorrected. (Br. 2) However, this passage from *Lee* indicates the presence or absence of error on the merits is not relevant to the jurisdictional question presented herein.

the defendant has moved for a mistrial not attributable to prosecutorial or judicial overreaching. 424 U.S. 600. Essentially, the *Lee* opinion concludes that the defendant in that case had moved for a mistrial and, therefore, was not entitled to invoke the Double Jeopardy Clause.

The *Dinitz* decision is simply not relevant to the circumstances of this case. The primary criterion for granting the government appeal in *Dinitz* is the fact that the court granted a *mistrial*. This is why the court in *Lee* relied on the *Dinitz* decision by noting that the facts in *Lee* were functionally indistinguishable from a mistrial. This brief has already elaborated on the various reasons as to why the action taken in district court was not a mistrial, but rather a final decision in his favor based on the judge's conclusion that he could not be prosecuted.

Any attempt to compare the facts in *Dinitz* with the instant situation is fruitless. The facts set forth in that opinion indicated that the defendant was afforded three specific alternatives, two of which involved avoiding termination of the trial by adjournment or proceeding without desired counsel. Similar alternatives were not offered to the respondent herein. Counsel diligently filed his motion to dismiss for pre-accusation delay long before the date of trial in an effort to obtain a pre-jeopardy determination. He was rebuffed in this attempt with the judge noting that the motion might be renewed after presentation of evidence, which meant that the court would not entertain any motion until *after* jeopardy had attached. Thus, the respondent elected to avoid being placed in jeopardy but the court required him to be so exposed before it would consider his motion.

Furthermore, from the recitation of the facts in *Dinitz*, it is clear that the court did not contemplate that the

defendant could not be successfully prosecuted or that proceedings against him were finally terminated.[7] The third alternative afforded the option of a mistrial, but for what purpose? The court said this would permit the defendant to obtain new counsel. Why would the defendant need different counsel if he weren't going to be reprosecuted? If the proceedings were finally terminated, he would have no need for a lawyer. Thus, the opinion justifiably concluded that the lower court did not contemplate an end to all prosecution when the mistrial was granted.[8]

The respondent herein clearly did not engage in the elaborate evaluation suggested by the court in *Dinitz* prior to making a motion. The *Dinitz* situation of error occurring during trial caused the opinion to conclude:

> "But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in . . . a second prosecution."

United States v. Dinitz, supra, 424 U.S. at 608.

[7] The petitioner herein concedes that the court dismissed with prejudice and concluded the defendant would not be reprosecuted. (Br. 11).

[8] The petitioner's suggestion that the respondent wanted his trial terminated knowing he could be reprosecuted is without basis. This is so, particularly in view of respondent's decision to forego a mistrial during testimony of government witness, Clifford Best, which included prejudicial testimony. The respondent through his counsel stated that he wished to have his fate determined during the ongoing trial and declined to request a mistrial despite ample grounds therefor.

When prejudicial error occurs in front of the jury, it may be said, as in *Dinitz*, that the particular proceeding is tainted and warrants a mistrial. In the instant case, there was no error occurring during trial before the jury. The factfinders were not "tainted". The basis for dismissal involved a decision that the defendant could not be prosecuted based on the evidence presented at trial. There was no suggestion that the jury had been contaminated, justifying the empanelling of a new group of factfinders. Regardless of which panel of jurors hear the evidence in this case, the court concluded, after jeopardy had attached, that the prosecution must end. The pre-accusation delay did not increase the probability of conviction before the particular jury empanelled. The court concluded that the prosecution was defective for reasons that could not affect one jury more or less profoundly than another.

2. The mere possibility of a motion in arrest of judgment, when not made, does not determine whether the Double Jeopardy Clause applies where the proceedings have been concluded in a defendant's favor.

The petitioner suggests that the defendant should have postponed the motion to dismiss until after a verdict was rendered by the jury on all three counts. This argument might have some validity were this a situation where the defendant had deliberately deferred a motion to dismiss until after jeopardy attached.[9]

[9] Indeed, the petitioner suggested that respondent had done just that in its brief in support of the petition for writ of certiorari. (Br. 6). This Court has reserved for decision the issue of whether government appeal is permitted when a defendant is afforded the chance to have a pretrial ruling of a legal defense and deliberately defers raising the issue until after he has been placed in jeopardy. *Serfass v. United States*, 420 U.S. 377.

However, in this case, respondent acted with due diligence in presenting arguments to the court. He filed the motion to dismiss due to pre-indictment delay with a number of other petitions within two weeks after arraignment as ordered by the magistrate and local court rule. These pretrial requests were supported by briefs and oral arguments. This is decisively different from the defendant in *Lee* who waited until the threshhold of his trial to raise the motion to dismiss.[10]

It must be remembered that the *respondent* did not request that the judge reserve ruling on the issue until after the trial had commenced. It was the court that ordered the motion denied and declined to reconsider it until after all of the evidence had been presented. (A. 15).[11] The respondent simply abided by the court's ruling and refrained from renewing the motion until after all evidence was presented.

[10] Likewise, this is not the type of hypothetical tactic that was frowned upon in the *Serfass* decision where the defendant deliberately delayed a motion until after jeopardy had attached.

[11] In fact, the procedure followed by the trial judge was most appropriate. In reviewing the merits of a motion such as this, the court must necessarily hear all of the facts of the case to determine whether a defendant has suffered prejudice of a degree that would warrant dismissal. To present all of the evidence in a pretrial hearing would constitute a waste of the court's time and, effectively, require both sides to present all of their evidence twice. This type of motion is not like a motion to suppress which customarily isolates a portion of the evidence for consideration. Prejudice can only be gleaned after an examination of the evidence in total. Consequently, the procedure employed by the trial judge in the instant case has been suggested by reviewing courts. Petitioner concedes this point. (Br. 25).

Petitioner relies on Fed. R. Crim. P. 12(e) to support its petition by saying that the judge erred in deciding the motion after jeopardy attached. Initially it is noted that when the judge denied the pretrial motion and refused to reconsider until after all evidence was presented, Rule 12(e) was not in effect.[12] In addition, the Rule forbids deferral of a decision on a motion where a party's appellate prerogatives are, thereby, restricted. The trial judge did not *defer* the determination of the motion until trial. It denied the motion because the respondent had not sustained his burden in regard to a showing of intentional delay by the government and/or resultant prejudice. The court simply did not find the respondent's position meritorious. However, after the evidence was presented the judge ruled that the burden had been sustained as to both intentional delay and prejudice.[13]

The petitioner's argument based on Rule 12(e) ignores the purpose of the Double Jeopardy Clause which is to bar multiple trials for the same offense and exposing an accused to repeated expense and anxiety. *See, Green, supra.* Petitioner contends that barring retrial after an erroneous dismissal of the indictment would "disserve 'the purpose of law to protect society from those guilty of crimes' ". (Br. 27, n. 21). This type of reasoning has been rejected by this Court. Whether or not the trial judge's decision was erroneous or correct is not relevant to a determination of the applicability of the Double

[12]The effective date for Rule 12(e) was December 1, 1975, and the order denying the motion was entered November 20, 1975.

[13]As petitioner concedes, the nature of this type of motion necessarily requires that the evidence be presented before it could be granted. (Br. 26).

Jeopardy Clause. In *Lee,* the opinion stated that if the trial judge rules that a defendant cannot be convicted, retrial is barred whether the decision is correct or not. *See, Lee, supra.* Therefore, the petitioner's argument as to Rule 12(e) would not be relevant unless, and until, it is determined that the Court of Appeals has jurisdiction to review the decision and order yet another trial. At that point the petitioner could present its position on Rule 12(e) as well as its contention that an insufficient showing of prejudice was made.

Finally, this reasoning ignores one simple fact. Petitioner contends that, since a decision on the motion to dismiss *could* have been deferred until after a jury verdict, the *Wilson* opinion should apply. However, the entire basis for the *Wilson* decision is that the defendant would not be retried, but, rather, a verdict would be reinstated. Respondent submits that the issue is not whether he could avoid further proceedings. Rather, the Double Jeopardy Clause asks "*will* a second trial occur". Obviously, there is no verdict to reinstate here and a retrial *is* necessary with all the attendant cost, anxiety and advantage to the government that the Fifth Amendment forbids. *See, Green v. United States, supra.*

CONCLUSION

The judgment rendered by the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM C. MARIETTI
820 Terrace at Clay
Muskegon, Michigan 49440

ALEXIS J. ROGOSKI
704 Hackley Bank Building
Muskegon, Michigan 49440

Counsel for Respondent